

was based on sex; (4) the harassment affected a "term, condition or privilege" of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. See Shepherd v. Comptroller of Public Accounts for the State of Texas, 168 F.3d 871, 873 (5th Cir. 1999).

Because Title VII addresses only "ultimate employment decisions," Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995), Roberts failed to state a prima facie case because the "lead tech" job did not constitute a new position – it required identical hours and received identical pay. Additionally, even assuming the "lead tech" job was considered a new position, the Hospital put forward valid, non-discriminatory reasons (namely, that Roberts was not suited for the job as she did not get along with others well, and that the person hired had superior credentials) that Roberts is unable to rebut with competent summary judgment evidence.

9

Similarly, Roberts failed to adduce any material issue of triable fact connecting her EEOC complaint with her valid termination, so her Title VII retaliation claim also fails under McDonnell-Douglas. Based on the numerous valid reasons for her termination, and the dearth of evidence demonstrating any sort of pretext for that termination decision, Roberts fails on this claim as well. Cf. Chancy v. New Orleans Public Facility Management, Inc., 179 F.3d 164, 168 (5th Cir. 1999) (discussing the very high standard a plaintiff must meet once an employer articulates a rational justification for the termination).

The judgment of the district court is **AFFIRMED**.

10

APPENDIX 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

JOAN CAROL ELLIS ROBERTS,	§	Filed Clerk
Plaintiff,	§	U.S. District Court
	§	04 Jul 22 PM 4:59
	§	Texas Eastern
v.	§	By M. Velin
	§	
TITUS COUNTY MEMORIAL	§	5:03-CV-21-DF
HOSPITAL, et al,	§	
Defendants.	§	

FINAL JUDGMENT

Having granted Defendants' Motion for Summary Judgment, filed April 28, 2004 (Dkt. No. 88), it is hereby

ORDERED, ADJUDGED and DECREED that Plaintiff's above-entitled and numbered cause of action is **DISMISSED WITH PREJUDICE**.

All pending motions filed by either party not previously ruled on are hereby **DENIED**.

SIGNED this 22nd day of July 2004.

David Folsom

DAVID FOLSOM

UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

JOAN CAROL ELLIS ROBERTS,	§	Filed Clerk
Plaintiff,	§	U.S. District Court
	§	04 Jul 22 PM 4:59
	§	Texas Eastern
v.	§	By M. Wlin
	§	
TITUS COUNTY MEMORIAL	§	5:03-CV-21-DF
HOSPITAL, et al,	§	
Defendants.	§	

ORDER

Before the Court is Defendants' Motion for Summary Judgment, filed April 28, 2004 (Dkt. No. 88). After consideration of the briefing by the parties and the relevant law, the Court finds Defendants' motion to be well-founded and is therefore **GRANTED**.

I. BACKGROUND

This case arises from allegations of deprivation of the Plaintiff's rights of free speech under the First and Fourteenth Amendments of the United States Constitution in violation of 42 U.S.C. §1983 by: (1) Defendant Titus County Memorial Hospital's ("TCMH" or "Hospital") implementation of a departmental policy based on paragraph 6 of the American Registry of Radiologic Technologists ("ARRT") Code of Ethics ("AART #6") that prohibited Plaintiff from diagnosing and giving medical advice;¹ (2) the Defendant's policy regarding which prohibited the Plaintiff from soliciting employees while she or the employees were on the job; and (3) warning

¹ AART #6 states: "[T]he radiologic technologist acts as an agent through observation and communication to obtain pertinent information for the physician to aid in the diagnosis and treatment of the patient and recognizes that interpretation and diagnosis are outside the scope of practice for the profession." D. Mot. Summ. J., Ex. 6 [hereafter D. Mot.].

Page 1 of 36

notices to Plaintiff to discontinue diagnosing patients and solicitation.

Plaintiff claims she had a constitutional right to diagnose and give medical advice. Plaintiff also claims she had the constitutional right to solicit information from employees while on duty to help her in a lawsuit filed under the Texas Whistleblower laws. Plaintiff had a lawsuit pending in the District Court for Titus County, 76/276th Judicial District, Cause No. 29675, for alleged violations of the Texas Whistleblower Act on which the Court recently granted Defendant summary judgment.

Plaintiff further alleges she was deprived of her Due Process rights under the First and Fourteenth Amendments of the United States Constitution in violation of 42 U.S.C. § 1983 by the exercise of "the established policies and customs" of the AART #6 policy relating to the standard of conduct of radiologic technologists and the Defendant's policy against solicitation while at work.

Plaintiff also alleges she was intentionally discriminated against because of her sex in violation of Title VII, creating an abusive hostile work environment for: (1) exercising her rights to free speech; and (2) filing EEOC charges of sex discrimination. Plaintiff claims an abusive, hostile work environment was created by: (1) George Burns's association with Dr. Davis, Dr. Aydlott, Adam Larson, Gene Lott, Steve Jacobson, Darrell Beck and Francis Standridge; (2) reprimanding Plaintiff in March and April 2002; (3) unfavorable performance reviews; (4) creation of a new position of Lead CAT Scan Tech and awarding the position to Darrell Beck; (5) unequal treatment of Plaintiff by treating Plaintiff's male co-

worker with different "communicative efforts" and giving the male co-worker "privileges and professional courtesies not afforded plaintiff"; (6) Defendant's policy addresses only sexual harassment and not nonsexual discrimination motivated by gender bias; (7) Defendant's EEOC policy refers to employees, not employers; and (8) George Burns' violation

Page 2 of 36

of Title VII by creating a discriminatory abusive work environment in treating male co-workers differently than Plaintiff. Plaintiff additionally alleges she was retaliated against in violation of Title VII for making an EEOC charge of sex discrimination on December 18, 2001.

II. APPLICABLE LAW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A dispute regarding a material fact is "genuine" if the evidence would permit a reasonable jury to return a verdict in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). This Court must construe the evidence in the light most favorable to Plaintiff and draw all reasonable inferences in, her favor. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150-51 (2000).

If the record, taken as a whole, however, could not lead a rational trier of fact to find for the non-moving party, there exists no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986). "This court is not required to 'comb the record' in search of a genuine issue of material fact." Dethrow v. Parkland Health Hosp. Sys., No. 3:00-CV - 2126-D, 2002 U.S. Dist. Lexis 4182, at *4 (N.D. Tex. 2002). "Rule 56 does

not impose a duty on the district court to sift through the record in search of evidence to support a party's opposition to summary judgment." Doddy v. Oxy USA, Inc., 101 F.3d 448, 463 (5th Cir. 1996) (citing Jones v. Sheehan, Young & Culp, P.C., 82 F.3d 1334, 1338 (5th Cir. 199)). "Rule 56, therefore, saddles the non-movant with the duty to 'designate' the specific facts in the record that create genuine issues precluding summary judgment, and does not impose upon the district court a duty to survey the

Page 3 of 36

entire record in search of evidence to support a non-movant's opposition." Jones, 82 F.3d at 1338. The nonmovant must go beyond her pleadings and designate specific facts showing there is a genuine issue for trial. Celotex, 477 U.S. at 324.

Once the movant for summary judgment makes a showing that no genuine issue of material fact exists, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish there is a genuine issue of material fact for trial. To carry this burden, the "opponent must do more than simply show . . . some metaphysical doubt as to the material facts." Matsushita Electric, 475 U.S. at 586. Instead, the nonmovant must show that the evidence is sufficient to support a resolution of the factual issue in her favor. Anderson, 477 U.S. at 249.

A party opposing summary judgment may not rest on mere conclusory allegations or denials in its pleadings unsupported by specific facts. *Id.* The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Edwards v. Alamo Rent-A-Car, No. 3:97-CV-2661-R, 1999 U.S. Dist. Lexis 13133 (N.D. Tex. 1999). In the absence of proof, the Court will not assume the nonmoving party could or would prove the necessary facts. Garrity v. Nationsbank of Texas, N.A., No. 3:98 - CV- 0437-H, 1999 U.S. Dist. Lexis 1454 (N.D. Tex. 1999).

III. DISCUSSION

In her Third Amended Petition, filed April 14, 2004 (Dkt. No. 80), Plaintiff asserts violations of her First and Fourteenth Amendment Constitutional rights. In Count 1, Plaintiff claims Defendants violated her rights to free speech by: (1) implementation of a departmental policy entitled ARRT #6 that is unconstitutionally vague; and (2) by letters of warning that required Plaintiff to discontinue her speech. In Count 2, Plaintiff claims Defendants violated her free speech rights with

Page 4 of 36

the promulgation of Defendant's solicitation policy. In Count 3, Plaintiff claims Defendants violated her Due Process rights by terminating her employment without fairly established pre- and post-termination procedures. In Count 4, Plaintiff claims Defendants discriminated against her based on her sex in violation of Title VII. In Count 5, Plaintiff claims Defendants retaliated against Plaintiff for constitutionally protected speech in violation of Title VII. The Court will now address these claims and the arguments of the parties.

A. PLAINTIFF'S FREE SPEECH CLAIMS UNDER COUNT 1 OF THE THIRD AMENDED PETITION

Plaintiff claims in Count 1 of her Third Amended Petition and Response to Defendants' Motion for Summary Judgment that Defendants violated her rights under the First and Fourteenth Amendments to the Constitution in violation of 42 U.S.C. §1983. 3d Am. Pet. at 18; P. Resp. D. Mot. Summ. J. at 6 [hereafter P. Resp.]. In particular, Plaintiff claims a TCMH departmental policy that prohibited Plaintiff from speaking out as a "patient advocate" is unconstitutionally vague as applied to Plaintiff and all x-ray technologists. 3d Am. Pet. at 19; P. Resp. at 6.

1. Vagueness Claim

Plaintiff claims the departmental policy was first conveyed to

Plaintiff during a March 4, 2002, counseling session with George Burns, TCMH Director of Radiology. The counseling record of that session informed Plaintiff that

interpreting (or giving your opinion) of C.T. scans to physicians is out of your "scope" of practice - this is not the first time you have been told about this. If ask[ed] what you found[,] you are to direct [patients] to the radiologist. See attached ARRT Standards of Ethics. This happened twice on FEB 28[, 2002]. Also[,] a patient reported that you advised her not to follow her physician's advice. Discussing and/or advising a [patient] regarding treatment is clearly out of your scope of practice. If you continue to advise physicians [and] patients regarding outcomes or treatment[,] you may be terminated.

Page 5 of 36

P. Resp., Ex. 3.

On April 9, 2002, Gene Lott, TCMH Director of Human Resources, counseled Plaintiff a second time. D. Mot. Summ. J., Ex. 8 [hereafter D. Mot.]. The counseling letter addressed two issues. The first issue involved non-responses to pages while on call off duty. The second issue involved the unauthorized diagnosing of patients. As stated in the letter from Mr. Lott to Plaintiff,

The other issue involves you diagnosing patients' problems after they undergo procedures that you performed. Several patients have made complaints in reference to you giving them medical advice. It is not your job nor is it in your scope to diagnose or recommend patient treatment. This type of behavior needs to cease immediately.

This letter will serve as a final warning in reference to both issues addressed in this write-up. Any further violation of this type could result in termination of employment.

Id.

The policy alleged by Plaintiff adopts the language of ARRT #6,

which states: "[T]he radiologic technologist acts as an agent through observation and communication to obtain pertinent information for the physician to aid in the diagnosis and treatment of the patient and recognizes that interpretation and diagnosis are outside the scope of practice for the profession." P. Resp., Ex. 6. (emphasis added). Plaintiff claims the terms "interpretation" and "diagnosis" are vague, not clearly defined by Defendants, and fail to provide persons of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. P. Resp. at 9.

A statute, rule, or policy can be impermissibly vague for either of two independent reasons. The first reason is if the statute, rule, or policy fails to provide people of ordinary intelligence a reasonable opportunity or fair notice to understand what conduct it prohibits. The second reason is if the statute, rule, or policy authorizes or even encourages arbitrary and discriminatory enforcement.

Page 6 of 36

Chicago v. Morales, 527 U.S. 41, 56-57 (1999). "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . . ." Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966). The purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). Defendants challenge Plaintiff's vagueness argument as improper against TCMH because ARRT #6 is a national guideline for radiology technicians that Plaintiff allegedly has been aware of since its inception. D. Reply to P. Resp. at 3 [hereafter D. Reply]. Defendants argue the departmental policy is based on the Code of Ethics for the American Registry of Radiologic Technologists and that paragraph 6 applies to persons who hold certificates from the ARRT. The ARRT Code of Ethics is provided to serve as a guide

by which Registered Technologists can evaluate their professional conduct as it relates to patients, health care consumers, employers, colleagues, and other members of the health care team. The ARRT departmental policy was provided to Plaintiff, as well as all Registered Technologists at TCMH, as a guideline for the acceptable level of professionalism and conduct the hospital would accept.

Defendants further argue the departmental policy simply prohibited plaintiff, and all other similarly situated technicians, from interpreting x-rays or CAT scan results or giving medical diagnoses, which persons such as Plaintiff are not qualified to do. Plaintiff did not attend medical school, is not a licensed medical doctor, nor is a licensed radiologist.

Accordingly, the Court finds the Hospital's policy that prohibited Plaintiff from interpreting x-rays or CAT scan results and diagnosing patients based on x-rays or CAT scan results provides

Page 7 of 36

people of ordinary intelligence a reasonable opportunity or fair notice to understand what conduct the policy prohibits. The policy does not authorize or encourage arbitrary and discriminatory enforcement because people of ordinary intelligence understand that unqualified medical personnel should not interpret x-rays or CAT scan results, diagnose patients, or tell patients not to follow the advice of their doctor. Morales, 527 U.S. at 56-57.

The Hospital policy therefore is not "so vague and standardless" that it leaves radiologic technologists uncertain as to the conduct it prohibits. Giaccio, 382 U.S. at 402-403. Radiologic technologists, such as Plaintiff, had fair notice of the policy's requirements to enable the technologists to conform their conduct to the policy. Morales, 527 U.S. at 42.

2. Public Concern Claim

Plaintiff's second claim in Count 1 is that her speech as a "patient advocate" involved matters of political, social, or other

concern that are constitutionally protected under the First Amendment. 3d Am. Pet. at 21; P. Resp. at 14. Plaintiff argues that her interest in her speech outweighed the hospital's interest because Plaintiff's was in the best interests of patients' welfare, the public, and the hospital. 3d Am. Pet. at 22. In addition, Plaintiff alleges the warning notices she received on March 4, 2002, and April 9, 2002, that ordered her to discontinue activities of diagnosing patients violated her free speech rights as a patient advocate. P. Resp. at 19-20, Ex. 14; D. Mot. Ex. 8. Despite these warnings, Defendants allege Plaintiff continued her behavior.

The First Amendment protects a government employee's speech if the speech is on a matter of public concern and the employee's interest in expressing herself on this matter is not outweighed by any injury the speech could cause to the government's interest, as an employer, in promoting the efficiency of the public services it performs through its employees. Waters v. Churchill, 511 U.S.

Page 8 of 36

661, 667, 671 (1994). Speech involves a matter of public concern when it is made primarily in the speaker's role as a citizen rather than as an employee addressing only matters of personal interest. Connick v. Myers, 461 U.S. 138, 148 (1983).

Connick v. Myers teaches that "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." 461 U.S. at 147. The Court noted that "when employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. Review by a federal court is improper where the speech involves matters of solely personal interest. *Id.* at 147; see also Ayoub v. Texas A & M University, 927 F.2d 834, 837 (5th Cir. 1991) (holding that a professor's complaint

about a discriminatory pay scale was not a matter of public concern where the professor's complaint focused on his individual compensation).

Against this winnowing of liability the courts have established a limiting principle; the fact that an employee's speech contains an element of personal interest is not fatal. In Thompson v. City of Starkville, Miss., a police officer protested improper promotions by filing grievances and aiding others in filing grievances. 901 F.2d 456 (5th Cir. 1990). The Court held the officer's speech constituted a matter of public concern because his allegations of police misconduct brought attention to matters beyond purely personal interest. *Id.* at 463 ("The existence of an element of personal interest on the part of an employee in his or her speech does not, however, dictate a finding that the employee's speech does not communicate on a matter of public concern.").

Page 9 of 36

The public nature of the concern is not weakened by the fact that Plaintiff chose to voice her complaint within the organization. In Civhan v. Western Line Consol. School Dist., the Court stated:

The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

439 U.S. 410, 415-16 (1979).

With regard to the diagnosing of patients, Defendants argue Plaintiff fails to identify any speech that is protected as a matter of public concern which might qualify for First Amendment protection. Defendants argue that in a similar case, the Fifth Circuit in Southern Christian Leadership Conference v. Supreme Court of State of La., 252 F.3d 781 (5th Cir. 2001), held a Louisiana Supreme Court rule that prohibited non-lawyer students from

representing certain solicited indigent parties as attorneys did not hinder or prevent speech of any kind. Id. at 789-90. Because the rule did not directly regulate speech, the rule did not prohibit speech when there "existed no right among unlicensed law students to practice law. Id. Defendants similarly argue they did not prohibit or regulate Plaintiff's speech when Plaintiff, who is not a licensed physician, had no right to practice medicine by diagnosing patients and provide unsolicited diagnoses to doctors.

In the case at bar, Plaintiff was providing diagnoses to patients that received x-rays and CAT scans and providing unsolicited diagnoses to radiologists. Plaintiff contends that at least once, she has correctly diagnosed a patient based on the x-rays or CAT scans taken of the patient when the radiologist incorrectly diagnosed the patient's condition. For example, Plaintiff alleges she correctly.

Page 10 of 36

diagnosed a patient as having a brain tumor when the radiologist missed the diagnosis after examining the patient's CAT scan results.

The primary interest of hospitals is to ensure patients receive the best quality health care possible. The quality of health care, a patient receives is partly dependent on a hospital's ability to prevent foreseeable acts of negligence that have profound effects on patients' health. Based on the findings of the Fifth Circuit in Southern Christian Leadership Conference, however, the Court must find that Plaintiff's speech was not protected as a matter of public concern. Plaintiff, who is not a licensed physician, had no right to practice medicine by diagnosing patients and provide unsolicited diagnoses to doctors or patients.

Even if the Court had found that Plaintiff's speech touches matters of public concern, Pickering v. Board of Education requires the Court to balance Plaintiff's interest in making her statements against "the interest of the State, as an employer, in promoting the efficiency of public services it performs through its

employees." 391 U.S. 563, 568 (1968). The Court should not consider Plaintiff's statement in a vacuum. Rankin v. McPherson, 483 U.S. 378, 384 (1987). Also relevant is the manner, time, and place in which the speech occurs. As noted in Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979), "Private expression. . . may in some situations bring additional factors to the Pickering calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." Id. at 415, n. 4.

The Supreme Court has recognized as relevant considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working

Page 11 of 36

relationships for which personal loyalty and confidence are necessary, impedes the performance of a speaker's duties, or interferes with the regular operation of the enterprise. Pickering, 391 U.S. at 570-73. "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." Rankin, 483 U.S. at 388; Givhan, 439 U.S. at 415, n. 4.

Even if Plaintiff's speech could generally be categorized as touching on a public concern, the Court finds the Hospital was within its rights to regulate the time, manner, and place of Plaintiff's speech when Plaintiff was not qualified to provide diagnoses. The Defendants therefore properly regulated the manner, time, and place of Plaintiff's speech with the implementation of the departmental policy using ARRT #6 and the warning notices that required Plaintiff to discontinue her speech.

Defendant is therefore entitled to summary judgment on Count

1 of Plaintiff's free speech claims.

B. PLAINTIFF'S FREE SPEECH CLAIMS UNDER COUNT 2 OF THE THIRD AMENDED PETITION

In Count 2 of the Third Amended Petition, Plaintiff alleges the Defendants' policy regarding solicitation violated her freedom of speech. 3d Am. Pet. at 25-30.; P. Resp. at 16, 18. At the time Plaintiff was provided the Defendants' solicitation policy, Plaintiff was soliciting TCMH employees for information to use in her state Whistleblower lawsuit against TCMH. Plaintiff asserts she was acting under the direction of the Hospital attorney that requested Plaintiff to furnish the attorney with the names, addresses, and telephone numbers of all possible witnesses in the Texas Whistleblower lawsuit as required by law. P. Resp. at 18. The Whistleblower lawsuit involved alleged violations of competitive bidding laws based on events that occurred in the purchase of a CAT scan machine

Page 12 of 36

Plaintiff alleges two causes of action in Count 2. Plaintiff contends the Hospital solicitation policy chilled Plaintiff's political speech relating to the Texas Whistleblower Act amounting to viewpoint discrimination. P. Resp. at 16. Plaintiff also contends her activities in gathering the information needed for the Texas Whistleblower suit rose the level of public concern. Id.

1. Matter of Public Concern

The Texas Whistleblower Act prohibits a state or local governmental entity from taking adverse personnel action against "a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." Tex. Gov't Code Ann. § 554.002(a) (Vernon Supp. 2004). The 'Whistleblower Act is designed to enhance openness in government and compel the government's compliance with law

by protecting those who inform authorities of wrongdoing. Hill v. Burnet County Sheriffs Dep't, 96 S. W. 3d 436, 440 (Tex. App.- Austin 2002, pet. denied). The Act evidences two legislative purposes: (1) to protect public employees from retaliation by their employer when, in good faith, employees report a violation of the law, and (2) to secure lawful conduct on the part of those who direct and conduct the affairs of public bodies. City of Austin v. Ender, 30 S. W. 3d 590, 594 (Tex. Ap. - Austin 2000, no pet.); Travis County v. Colunga, 753 S. W. 2d 716, 718-19 (Tex. App. - Austin 1988, writ denied). Because the Act is remedial in nature, it should be liberally construed to effect its purpose. Hill, 96 S. W. 3d at 440.

Accordingly, the Court finds that based on the content, form, and context of statements provided by plaintiffs in pursuit of a Texas Whistleblower Act claim, Connick, 461 U.S. at 147, such statements can be fairly considered as relating to matters of political, social, or other concern to the community. Thus, Plaintiffs statements in pursuit of her Texas Whistleblower Act claims can be

Page 13 of 36

fairly considered as relating to matters of political, social, or other concern to the community. Plaintiff's solicitation activities in the Hospital, however, do not enjoy the same protections as her speech in pursuit of her Texas Whistleblower Act claims.

In response to her solicitation activities, Plaintiff received a memorandum, dated April 9, 2002, from Defendants that stated the following:

We cannot and will not tell you whom you can or cannot solicit[,] but we can prohibit you from soliciting employees while you are on duty. Additionally, you cannot solicit employees that are on duty.

In other words, you cannot solicit anyone here at the hospital while you and/or they are working. . .

This should be considered your final warning - any further violations of this nature could result in termination of employment.

D. Mot., Ex. 7. Defendants argue Plaintiff was soliciting employees at the hospital during working hours, disrupting the operation of the hospital, and causing complaints from other employees regarding her solicitation. Id. at 12.

Similarly, the respondent in Connick prepared a questionnaire that she distributed to other persons in her office concerning an office transfer policy, office morale, need for a grievance committee, level of confidence in supervisors, and whether employees felt pressure to work in political campaigns. Connick, 461 U.S. at 141. The Court held that except for the question regarding pressure upon employees to work in political campaigns, questions posed in the questionnaire did not fall under rubric of matters of "public concern." Id. at 148. The Court further held the respondent's distribution of the questionnaire threatened the functioning of the office. Id. at 151. The government agency's institutional efficiency was threatened not only by the content of the employee's message, but also by the manner, time, place in which it was delivered. Id. at 153.

Page 14 of 36

The termination of the employee's employment therefore did not offend the First Amendment. Id. at 154.²

Accordingly, while the Court finds Plaintiff's statements in pursuit of her Texas Whistleblower Act claims against the Hospital can be fairly considered as relating to matters of political, social, or other concern to the community, Plaintiff's solicitation activities cannot. Plaintiff was certainly free to contact employees after working hours when both Plaintiff and the employees were not working. Defendants, however, were within their rights to regulated the manner, time, and place of Plaintiff's solicitation

activities to the extent Plaintiff's activities disrupted the efficiency of the Hospital's goal of treating patients.

2. Viewpoint Discrimination

In order for Plaintiff to show viewpoint discrimination in violation of the First Amendment, Plaintiff must show that Defendants discriminated against Plaintiff based on constitutionally protected speech. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995). In determining whether a state is acting to preserve the limits of a forum it has created so that exclusion of a class of speech is legitimate, there is a distinction between content discrimination,

² As Justice Powell explained in his separate opinion in Arnett v. Kennedy, 416 U.S. 134, 168 (1974):

To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Id. (cited in Connick, 461 U.S. at 151).

Page 15 of 36

which may be permissible if it preserves the purpose of the limited forum, and viewpoint, discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. *Id.* at 829-30.

According to Plaintiff, the Hospital solicitation policy defines working time as the following: "Working time does not include break periods, meal times, or other specified periods during the work day when employees are properly not engaged in performing their work tasks." 3d Am. Pet. at 26. Plaintiff asserts she approached Hospital co-workers when she or they were not

working. Id.; P. Resp. at 18. Plaintiff also asserts the solicitation policy was selectively enforced against Plaintiff to chill Plaintiff's undesirable speech. 3d Am. Pet. at 27; P. Resp. at 16.

Defendants argue Plaintiff was soliciting employees at the hospital during working hours, disrupting the operation of the hospital, and causing complaints from other employees regarding her solicitation. D. Mot. at 12. The Hospital was not a public or limited public forum, and according to Defendants, Plaintiff continued her solicitation, despite the fact she had been warned to cease her behavior. Id.

Defendants therefore terminated Plaintiff's employment on June 14, 2002. The termination letter stated,

On April 10, 2002, you received two different written final warnings. The subject areas covered in that counseling were solicitation of employees, on call responsibility and diagnosing patients' problems and giving them medical advice.

Since that meeting on April 10, 2002, you have violated the terms of that counseling session. Our information reflects that not only did you violate these terms, you, violated them several times in the areas of soliciting employees and diagnosing patients' problems and giving medical advice.

As a result of these willful violations we are terminating your employment with TCMH effective immediately.

Page 16 of 36

D. Mot., Ex. 1.

Plaintiff argues that specific facts were never revealed to her, such as: a) the names of people to whom she allegedly solicited; b) the specific details of her speech that classified it as solicitation as opposed to conversation; c) when the alleged actions took place; d) the names of people who allegedly complained; and e) the form of the alleged complaints. P. Resp. at 17. In response

Defendants rely on the language of *Waters* where the Court stated:

[E]mployers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct. What works best in a judicial proceeding may not be appropriate in the employment context. If one employee accuses another of misconduct, it is reasonable for a government manager to

credit the allegation more if it is consistent with what the manager knows of the character of the accused. Likewise, a manager may legitimately want to discipline an employee based on complaints by patrons that the employee has been rude, even though these complaints are hearsay.

It is true that these practices involve some risk of erroneously punishing protected speech. The government may certainly choose to adopt other practices, by law or by contract. But we do not believe that the First Amendment requires it to do so. Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability.

Waters, 511 U.S. 676-77; D. Mot. Summ. J. at 16.

Accordingly, in addition to the Court's finding that Plaintiff's solicitation activities do not rise to the level of a public concern, the Court finds the Hospital did not create a public or limited public forum for Plaintiff's solicitation activities. As earlier stated, Plaintiff was free to contact employees after employment hours when both Plaintiff and the employees were not working. In prohibiting Plaintiff's solicitation activities, however, Defendants acted to preserve the purpose of the Hospital's business in treating patients. As such, no viewpoint discrimination occurred on the

part of the Defendants when Defendants restricted the manner, time, and place of Plaintiff's solicitation activities.

Defendant is therefore entitled to summary judgment on Count 2 of Plaintiff's free speech claims.

C. PLAINTIFF'S DUE PROCESS CLAIMS UNDER COUNT 3 OF THE THIRD AMENDED PETITION

Plaintiff alleges in Count 3 of the Third Amended Petition that Defendants failed to provide constitutionally adequate safeguards, including a fair and impartial pre- or post-termination hearing and/or post termination appeal procedures, before and after they terminated Plaintiff's employment. 3d Am. Pet. at 30-34. In Plaintiff's Response, Plaintiff alleges Substantive and Procedural Due Process violations. P. Resp. at 22-25. Plaintiff further alleges that Defendants' implementation of ARRT #6 and the solicitation policy was a substantial motivating factor in Plaintiff's termination that occurred without a reasonable notice, good-faith investigation, and/or a hearing. 3d Am. Pet. at 32-33; P. Resp. at 22-25. Plaintiff also alleges that according to the By Laws of the hospital, Defendants could only terminate Plaintiff's employment for "good cause." P. Resp. at 25; Ex: 15.³

When a person has a property right in continued employment, that right may not be deprived, without due process. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). The Constitution, however, does not create property interests. "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). "To have a property interest

³ Article XI - ADMINISTRATOR of the Titus County Regional Medical Center,

Titus County Memorial Hospital, Board of Managers Bylaws states: "... [the Administrator] shall supervise the work of all employees and shall assign to the employees their respective tasks and duties and also may dismiss any employee for good cause and shall thereafter make a report to the Board of the dismissal." P. Resp., Ex. 15 (emphasis added).

Page 18 of 36

in a benefit, a person clearly must have more than an abstract need or desire for it. [She] must have more than a unilateral expectation of it. [She] must, instead, have a legitimate claim of entitlement to it." Id. A property interest can arise from such interests as a mutually explicit understanding or an express contract. Perry v. Sindermann, 408 U.S. 593, 601 (1972). This Court determines whether Plaintiff had a protected property interest by reference to state law. Bishop v. Wood, 426 U.S. 341, 344 (1976).

Texas state courts uniformly embrace the notion that employee handbooks or manuals, standing alone, "constitute no more than general guidelines," absent express reciprocal agreements addressing discharge protocols. Reynolds Mfg. Co. v. Mendoza, 644 S. W. 2d 536, 539 (Tex. App. 1982); see also, Ryan v. Superior Oil Co., 813 S. W. 2d 594, 596 (Tex. App. 1991); Hicks v. Baylor Medical Univ. Med. Center, 789 S. W. 2d 299, 302 (Tex. App. 1990); Benoit v. Polysar Gulf Coast, Inc., 728 S. W. 2d 403, 406 (Tex. App. 1987); Vallone v. Agip Petroleum Co., 705 S. W. 2d 757, 759 (Tex. App. 1986); Totman Y. Control Data Corp., 707 S. W. 2d 739, 744 (Tex. App. 1986); Molder v. Southwestern Bell Tel. Co., 665 S. W. 2d 175 (Tex. App. 1983).

The foregoing cases all illustrate the consistency with which Texas courts have adhered to the employment-at-will doctrine first enunciated in Eastline & R.R.R. Co. v. Scott, 72 Tex. 70, 75, 10 S. W. 99, 102 (1888). The ineluctable conclusion that under Texas law employment manuals generally do not create contract rights helps guide this Court's resolution of whether Plaintiff's property interest claim fails.

It has been an elementary requirement in employment law for

almost two decades that in order to bring a claim for deprivation of a property right, a plaintiff must clearly establish the existence of a property interest. Bishop v. Wood, 426 U.S. 341, 343-47 (1976); Brown v. Texas A

Page 19 of 36

& M University, 804 F.2d 327 (5th Cir. 1986). The Fifth Circuit has been clear that to demonstrate a constitutionally protected property interest, a plaintiff must "allege with specificity the particular state rule, regulation, law or understanding between the parties giving rise to the requirement of just cause prior to termination." Brown, 804 F.2d at 334. Mere conclusory allegations that one has been deprived of a property interest in continued employment is insufficient to establish the existence of a constitutionally protected interest. Id.

The Fifth Circuit requires three points to be alleged with particularity in order to bring a due process claim: "(i) the state or federal law or understanding giving rise to the property interest; (ii) the particular process that plaintiff was entitled to and failed to receive; and (iii) that the official's failure to provide these particular processes violated 'clearly established constitutional law' at the time of the alleged infraction." Brown, 804 F.2d at 333. Defendants argue Plaintiff has failed to allege any one of these three requirements.

Arguing the case of Spuler v. Pickar, 958 F.2d 103, 106 (5th Cir. 1992), Defendants state that "[p]ublic employees must demonstrate a property right founded on a 'legitimate claim of entitlement' based on 'mutually explicit understandings.'" Id. (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1976); see also Perry v. Sindermann, 408 U.S. 593, 601 (1972)). In Spuler, a university professor alleged he had a reasonable expectation of achieving tenure based upon a faculty handbook provision. Id. at 105. The Fifth Circuit found the faculty handbook provision did not create a protectible property interest, citing the foregoing

Texas state case law on employee handbooks and manuals. Id. at 106-07. The faculty handbook was found not to be a written employment agreement or a written representation of termination procedures and was not supplemented or supplanted by any express agreement or written representation. Id. at 107. It bestowed no contractual rights on the

Page 20 of 36

professor and no concomitant obligations on the university. Id. Because the professor pointed to no other source of entitlement to tenure, he enjoyed no property interest. Id. Without a property interest, the professor was entitled to no procedural or substantive due process protection. Id.

Like the plaintiff in Spuler, Defendants argue Plaintiff in this case has failed to show with specificity any particular state rule, regulation, law, or understanding between Plaintiff and Defendants that granted Plaintiff a constitutional right to continued employment. According to Defendants, Plaintiff has failed to show any "mutually explicit understandings," written employment agreement, or representation between herself and the Defendants that created a property right entitled to due process consideration. Plaintiff, however, relies on the Hospital's By Laws that indicate the Hospital Administrator could only terminate Plaintiff's employment for "good cause." P. Resp. at 25, Ex. 15.

Defendants argue "Texas law imposes a strong presumption in favor of at-will employment." Zenor v. El Paso Healthcare System, Ltd., 176 F. 3d 847, 862 (5th Cir. 1999) (citing Montgomery County Hospital District v. Brown, 965 S. W. 2d 501 (Tex. 1998)); Sabine Pilot Service v. Hauck, 687 S. W. 2d 733 (Tex. 1985) (Texas Supreme Court has been unfailingly clear that employment in this state is assumed to be "at will" unless otherwise shown.). In limited circumstances, employment policies may alter the at-will nature of the employment relationship and create enforceable contractual rights. Id. But to do so, "the policy must specifically

and expressly limit the employer's ability to terminate the employee." *Id.* "The policy must contain an explicit contractual term altering the at-will relationship, and must alter that relationship 'in a meaningful and special way.'" *Id.* (quoting *Figueroa v. West*, 902 S. W. 2d 701, 705 (Tex. App. 1995)). In fact, "Texas courts have been reluctant to imply contractual rights from non-explicit statements or employment policies." *Id.*

Page 21 of 36

Accordingly, the Court finds that Plaintiff has failed to show: (i) a state or federal law or understanding between Plaintiff and Defendants that give rise to a protected property interest; (ii) a particular process that Plaintiff was entitled to and failed to receive; and (iii) that the Defendants' alleged failure to provide particular processes to Plaintiff violated clearly established constitutional law before or after Defendants terminated Plaintiff's employment. Without a written contract between Plaintiff and Defendants, Plaintiff cannot show that she was a "for cause" employee. As such, the Court must presume Plaintiff was an "at-will" employee when the Hospital's By-Laws could not alter Plaintiff's employment status as an at-will employee without reference to the By-Laws in an employment contract.

Plaintiff additionally alleges she was deprived of her constitutionally protected property interest rights of continued employment when Defendants violated her Due Process rights to fair notice "and pre- and post-termination procedures. P. Resp. at 22-25. There exists no federal constitutionally protected interest in future employment. *Muniz v. City of Harlingen*, 247 F. 3d. 607, 608-09 (5th Cir. 2001). It is, however, a fundamental principle of constitutional law that "if the individual employee has not been granted a term of guaranteed employment, absent removal for just cause; [s]he will have no property right or entitlement to continued employment in that position." *Gonzales v. Galveston Indep. Sch. Dist.*, 865 F. Supp. 1241, 1249 (S.D. Tex. 1994) (citing

NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW (3rd ed. 1986)). Defendants argue because Plaintiff had not been granted a term of guaranteed employment, she did not possess a property right or entitlement to continued employment in her position.

Moreover, the failure to prove a First Amendment claim is fatal to a Substantive Due Process claim when the Plaintiff alleges she was discharged for exercising her right to free speech. Fowler

Page 22 of 36

v. Smith, 68 F.3d 124, 128 (5th Cir. 1995); Thompson v. Bass, 616 F. 2d 1259, 1268 (5th Cir.), cert. denied, 449 U.S. 983 (1980). Such is the case here. Plaintiffs Substantive Due Process claim is "based primarily on" the factual allegations underlying her First Amendment claims. Thompson, 616 F. 2d at 1268. The arbitrary and capricious actions of which Plaintiff complains were allegedly motivated by speech that enjoys no constitutional protection. Defendants are therefore entitled to summary judgment on Count 3 of Plaintiff's Due Process claims.

D. PLAINTIFF'S TITLE VII DISCRIMINATION CLAIM UNDER COUNT 4 OF THE THIRD AMENDED PETITION

Title VII makes it "an unlawful employment practice for an employer. . . to discharge. . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . [or] sex. . . ." 42 U.S.C. § 2000e-2(a)(1). "The Title VII inquiry is 'whether the defendant intentionally discriminated against the plaintiff.'" Johnson v. Louisiana, 351 F. 3d 616, 621 (5th Cir. 2003) (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983)). In order to withstand summary judgment, Title VII requires that Plaintiff, using direct or circumstantial evidence, "present sufficient, evidence for a reasonable jury to conclude. . . that 'race, color,

religion, sex, or national origin was a motivating factor for any employment practice.” Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) (quoting 42 U.S.C. § 2000e-2(m)).

Where there is no direct evidence of sex discrimination, the Court must apply a three-step analysis utilized by the Supreme Court. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-12 (1993); Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-58 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Hanchey v. Energas Co., 925 F.2d 96, 97 (5th Cir.

Page 23 of 36

1990). Direct evidence, in the employment discrimination context, is “evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption.” Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1217 (5th Cir. 1995) (quoting Brown v. East Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993)).

In the first step, the plaintiff must establish a prima facie case of discrimination. Portis v. First Nat'l Bank of New Albany, MS, 34 F.3d 325, 328 (5th Cir. 1994). If the plaintiff presents a prima facie case, a presumption of discrimination arises. Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 957 (5th Cir. 1993). At the second step, the defendant can rebut this presumption of discrimination by offering a legitimate, nondiscriminatory reason for the employment decision of which the plaintiff complains. Id. If the defendant satisfies this burden of production, the plaintiff's prima facie case dissolves and the case proceeds to the third step of the analysis. Id. At this third stage, the burden is on the plaintiff to prove that the reasons offered by the defendant are pretexts for sex discrimination. Id.

When the analysis proceeds to the third step, the plaintiff – to avoid summary judgment – must produce evidence from which a reasonable factfinder could find “that the employer’s reasons were not the true reason for the employment decision and that unlawful discrimination was.” Id. Accord Moore v. Eli Lilly

& Co., 802 F. Supp. 1468, 1471-74 (N.D. Tex. 1992), *aff'd*, 990 F.2d 812, 816 n. 24 (5th Cir.), *cert. denied*, 510 U.S. 976 (1993); Waggoner v. City of Garland, 987 F.2d 1160, 1166 (5th Cir. 1993); St. Mary's, 509 U.S. at 507-08.

Plaintiff may establish a violation of Title VII by demonstrating that discrimination based on sex has created a hostile or abusive work environment. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986). To set forth a *prima facie*

Page 24 of 36

claim of actionable harassment in the workplace, Plaintiff must produce evidence that: (1) she belongs to a protected group; (2) she experienced unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition or privilege" of employment; and (5) the city knew or should have known of the harassment and failed to take prompt remedial action. Shepherd v. Comptroller of Public Accounts for the State of Texas, 168 F.3d 871, 873 (5th Cir. 1999).

To establish a *prima facie* case of sex discrimination based on disparate treatment, Plaintiff must show: (1) that she is a member of a protected class; (2) she was qualified for her position; (3) she suffered an adverse employment action; and (4) others similarly situated were more favorably treated. Urbano v. Continental Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998). To survive summary judgment, Plaintiff must adduce specific facts showing a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Conclusory evidence is insufficient to demonstrate that Defendants treated similarly situated employees more favorably than they treated Plaintiff. *Id.*

Title VII was designed to address only ultimate employment decisions, not every decision made by employers that might have some tangible effect upon those ultimate decisions. Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995). "Ultimate employment

decisions" include acts such as hiring, granting leave, discharging, promoting, and compensating an employee. *Id.* at 782. They do not include anything that might jeopardize employment in the future, such as disciplinary filings, supervisor's reprimands, and poor performance by the employee. Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir.). To hold otherwise would impermissibly expand the definition of "adverse employment action" to include actions that may have had a tangential effect on conditions

Page 25 of 36

of employment. *Id.*

Plaintiff alleges that Defendants discriminated against Plaintiff because of her sex in violation of Title VII and created an abusive, hostile work environment by: (1) Defendant George Burns's association with the Dr. Davis, Dr. Aydlelott, Adam Larson, Gene Lott, Steve Jacobson, Darrell Beck, and Francis Standridge; (2) reprimanding Plaintiff in March 4, 2002, and April 9, 2002; (3) unfavorable performance reviews; (4) creation of a new position of Lead CAT Scan Tech and awarding the position to Darrell Beck; (5) unequal treatment of Plaintiff by treating Plaintiff's male co-worker with different "communicative efforts" and giving the male co-worker "privileges and professional courtesies not afforded plaintiff; (6) Defendants' nondiscrimination policies address only sexual harassment and not nonsexual discrimination motivated by gender bias; (7) Defendants' Equal Employment Opportunity Commission ("EEOC") policy refers to employees, not employers; and (8) George Burns's violation of Title VII by creating a discriminatory, abusive work environment in treating male co-workers differently than Plaintiff. 3d Am. Pet. at 35-46; P. Resp. at 25-26.

Defendants argue Plaintiff's allegations, (1) to (3) and (5) to (8) above, must fail as Plaintiff has not stated specific facts showing a genuine issue, and it is difficult to determine with certainty

what issues Plaintiff alleges.

With regard to Plaintiff's fourth allegation, Defendants argue that Plaintiff must first prove a prima facie case of discrimination. When an individual infers discrimination from an employer's failure to promote her, courts apply a modified version of the burden-shifting analysis. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e -16(c), a plaintiff alleging a discriminatory hiring practice bears the burden of proving a prima facie case that the defendant made an

Page 26 of 36

employment decision that was motivated by a protected factor. Scales v. Slater, 181 F. 3d 703, 709 (5th Cir. 1999). A Court in a failure-to-promote case applies similar criteria as a case of sex discrimination based on disparate treatment that a plaintiff must demonstrate that: (1) she is a member of a protected class; (2) she sought and was qualified for an available employment position; (3) she was rejected for that position; (4) the employer continued to seek applicants with the plaintiffs qualifications. Id. Plaintiff must establish four elements of the case in order to prove that she was treated differently. Id.

Defendants acknowledge Plaintiff is a member of a protected class in that she is female. However, as Defendants assert, the analysis must continue from there. Plaintiff alleges that a new position was intentionally created to punish her for her "Whistleblowing activities" and that she was not allowed to apply for this new position. P. Resp. at Under the second step of the Scales analysis, Plaintiff must prove there was an available employment position. However, according to Defendants, no new position was created.

As argued by Defendants, TCMH Radiology Management made the decision that with the addition of a new CT machine, there existed a need for one of the existing CT Technologist to be assigned "additional duties" and to designate that person as

"Lead Tech." There was no promotion or increase in pay. Each of the three CT Technologists, including Plaintiff, were considered for these duties. Darrell Beck was assigned as Lead Tech due to ability to expedite patient schedules, to interact effectively with the radiologists, and to communicate with patients and their families. Beck had also exhibited significantly superior people and organizational skills, and was the only veteran technologist who had the added credentials of CT registry (at that time). Therefore, according to Defendants, Plaintiff's claim must fail as she has failed to prove an essential element

Page 27 of 36

of her claim when, in fact, no newly created employment position was available. Furthermore, as Defendants argue, even if a new position was created, Plaintiff cannot show she was qualified for the position. The duties set forth in the "Lead Tech" position included coordination of scheduling, emergency procedures, communications, and maintaining acceptable interpersonal relationships (including communicating with the hospital's radiologists). According to Defendants, Plaintiff lacked the skills to effectively carry out the additional duties that would be required of a lead position. She was unable to coordinate scheduling in an appropriate manner and communicate effectively with the radiologists. Plaintiff had problems with her behavior, management, and with her co-workers. Additionally, Plaintiff's interpersonal skills, which were considered essential for the additional duties of the "Lead" technologist, were below normal.

Plaintiff scored low on her performance evaluations on her relationships with others and her conduct and compliance with policies on her performance evaluation dated March, 13, 2001. D. Mot. Summ. J., Ex. 15. She also scored low on her relationships with others, initiative and judgment, and conduct and compliance with policies on her performance evaluation dated November 23, 2001. Id. at Ex. 14.

Plaintiff was not suited to handle the additional duties that the lead technologist would have to deal with on a daily basis. This is also evidenced as early as 1992 when Plaintiff was evaluated by Nellie Viola, M.S., L.P.C. Ms. Viola stated that Plaintiff has a "history of numerous conflicts with her supervisors" and "the conflicts have persisted in spite of management changes." Ms. Viola further stated that Plaintiff has a tendency to "project blame onto others." In a second evaluation, dated September 22, 1992, Viola further stated that Plaintiff "sees herself as a victim of persecution" and "it is possible that she is not suited for working on a team of x-ray technicians because of some

Page 28 of 36

temperament characteristics." Id. at Ex. 16. According to Defendants, Plaintiff exhibited these same characteristics while working at Titus. Thus, as argued by Defendants, the foregoing information evidences that Plaintiff was not the best qualified for the duties of Lead Tech.

In the instant case, Plaintiff has proffered no evidence of discriminatory motive, and therefore has not raised the requisite factual issues to survive Defendants' motion for summary judgment. Plaintiff's own affidavit, P. Resp., Ex. 1, regarding the terms and nature of her employment, her job title and description, her performance, her credentials, and the credentials of Darrell Beck, as well as the actions of George Burns and Gene Lott, contains nothing that raises an inference of discriminatory intent on the part of the defendants. Likewise, Plaintiff's subjective beliefs that she was not selected for the new Lead Tech position based upon her sex is also insufficient to create an inference of the Defendants' discriminatory intent. Indeed, "a subjective belief of discrimination, however genuine [may not be the basis of judicial relief." Lawrence v. Univ. of Tex. Med. Branch at Galveston, 163 F.3d 309, 313 (5th Cir.1999); see also Ramsey v. Henderson, 286 F.3d 264, 269 (5th Cir. 2002) ("This Court has cautioned that

conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden in a motion for summary judgment.") (quotation omitted).

In sum, Plaintiff has failed to present any evidence under Count 4 that forbidden characteristics played a role in Defendants' decisions. Rubinstein v. Adm'rs of Tulane Educ. Fund., 218 F. 3d 392, 400 (5th Cir. 2000) (affirming grant of summary judgment based on "overall lack of any evidence of discriminatory intent"). Defendants are therefore entitled to summary judgment on Count 4 of Plaintiff's Title VII discrimination claims.

Page 29 of 36

E. PLAINTIFF'S TITLE VII RETALIATION CLAIM UNDER COUNT 5 OF THE THIRD AMENDED PETITION

In Count 5 of Plaintiff's Third Amended Petition, Plaintiff alleges Defendant retaliated against her for: (1) exercising her rights to free speech; and (2) filing an EEOC charge of sex discrimination. 3d Am. Pet. at 47-53; P. Resp. at 27-28.

Title VII makes it "an unlawful employment practice for an employer to discriminate against any of his employees. . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter. . ." 42 U.S.C. § 2000e-3(a). Similarly, a governmental entity may not retaliate against a public employee for exercising his constitutional right to freedom of expression. Rankin v. McPherson, 483 U.S. 378, 383 (1987); Wallace v. Texas Tech Univ., 80 F. 3d 1042, 1050 (5th Cir. 1996). However, there are limitations on a public employee's right to free speech in the workplace. Blackburn v. City of Marshall, 42 F. 3d 925, 931 (5th Cir.-1995).

1. Retaliation Based on Free Speech

The Fifth Circuit has developed a three-part test in First Amendment retaliation cases brought by public employees. The employee must establish that: (1) the speech involves a matter of public concern; (2) the employee's interest in commenting on the

matter outweighs the employer's interest in promoting efficiency; and (3) the exercise of free speech was a substantial or motivating factor in the adverse employment action. Denton v. Morgan, 136 F. 3d 1038, 1042 n. 2 (5th Cir. 1998) (citing Thompson v. City of Starkville, Miss., 901 F.2d 456, 460 (5th Cir. 1990)). An adverse finding at any stage of this test is conclusive and terminates the analysis. Coughlin v. Lee, 946 F. 2d 1152, 1156-57 (5th Cir. 1991).

First, retaliation by an employer for an employee's speech is actionable only if the speech addressed is a matter of public concern. Speech involves a matter of public concern when it is made

Page 30 of 36

primarily in the speaker's role as a citizen rather than as an employee addressing only matters of personal interest. Connick, 461 U.S. at 148-49 ("The First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."); but see Benningfield v. City of Houston, 157 F. 3d 369, 375 (5th Cir. 1998) ("The fact that an employee's speech contains an element of personal interest is not fatal, however."). The primary motivation of the speaker is determined by the "content, form, and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 147-48.

Plaintiff alleges she was retaliated against for exercising her free speech relating to the solicitation policy, making medical diagnoses, and giving medical advice. P. Resp. at 28. Because the Court has found that Plaintiff's speech relating to the solicitation policy, making medical diagnoses, and giving medical advice does not rise to the level of a public concern, Plaintiff has failed to prove the first prong of the Denton analysis. Accordingly, the Court need not determine the final two prongs of the analysis of: (2) whether the Plaintiff's interest in commenting on the matter outweighs the Defendant's interest in promoting efficiency; and

(3) whether the exercise of free speech was a substantial or motivating factor in the adverse employment action that terminated Plaintiff's employment.

Because Defendants operate a hospital for the public, they have a duty to the public to operate the hospital in an efficient and responsible manner. Protecting the public from an unqualified individual making medical diagnoses and giving medical advice to patients far outweighs any right the Plaintiff claims to have in giving her opinions regarding medical advice.

Additionally, Defendant has the right, as an employer, to prevent actions by an employee that would disrupt the work environment, undermine authority, and destroy close working

Page 31 of 36

relationships within the work environment. Connick, 461 U.S. at 148. Therefore, the Defendant's right to maintain a non-disruptive and efficient work environment outweighs any right Plaintiff could possibly have in soliciting employees while at work.

2. Retaliation for EEOC Charge of Sex Discrimination

For Plaintiff's second claim of retaliation for filing an EEOC charge of sex discrimination, this Court applies the three-step analysis utilized by the Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), to analyze Plaintiff's claims of discriminatory retaliation. Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1121-22 (5th Cir. 1998); Long v. Eastfield College, 88 F.3d 300, 304 (5th Cir. 1996). If Plaintiff establishes a prima facie case of retaliation, a presumption of discrimination arises, and the Defendants must articulate a legitimate, non-discriminatory reason for the employment action of which Plaintiff complains. Sherrod, 132 F.3d at 1122; Long, 88 F.3d at 304-05; Grizzle v. Travelers Health Network Inc., 14 F.3d 261, 267 (5th Cir. 1994). If Defendants satisfy their burden of production, Plaintiff must prove the ultimate issue of retaliation by showing that the reason offered is "a pretext for prohibited discrimination.

Sherrod, 132 F. 3d at 1122; Long, 88 F. 3d at 305; Grizzle, 14 F. 3d at 267.

To establish a prima facie case of retaliation, Plaintiff must show that (1) she engaged in an activity protected under Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the protected activity and the adverse employment decision. Shirley v. Chrysler First, Inc., 970 F. 2d 39, 42 (5th Cir. 1992); Collins v. Baptist Memorial Geriatric Center, 937 F. 2d 190, 193 (5th Cir. 1991). The causal connection required is cause-in-fact or "but for" causation. Jack v. Texaco Research Center, 743 F. 2d 1129,, 1131 (5th Cir. 1984).

Page 32 of 36

Defendants admit Plaintiff made complaints and Plaintiff's employment was terminated. However, Defendants argue there was no causal connection between Plaintiff's EEOC claim and the termination of Plaintiff's employment. To establish a causal link between Plaintiff's EEOC claim and the termination of Plaintiff's employment, Plaintiff must show that "but for" the protected activity, she would not have been terminated. In other words, Plaintiff must show that the termination would not have occurred, notwithstanding the other reasons advanced by the Defendants. McMillan v. Rust College, Inc., 710 F. 2d 1112 (5th Cir. 1983).

Plaintiff filed an EEOC claim alleging sex discrimination on December 18, 2001. D. Mot. Summ. J., Ex. 5. The EEOC did not pursue this claim. Plaintiff nevertheless was terminated on June 14, 2002, for refusing to follow her employer's instructions despite repeated warnings to do so. There was a period of six months between the EEOC claim and Plaintiff's termination. This period is too long to create an inference of retaliation. Monroe v. Oncor Energy Delivery Company, No. 3-01-CV-1012-D, 2003 U.S. Dist. Lexis 14728 (N.D. Tex. 2003) (15 month delay too attenuated to support an inference of retaliation); see also Sowell v. Alumina

Ceramics, Inc., 251 F. 3d 678, 685 (8th Cir. 2001) (seven month lapse too long for incidents to be temporally and causally related); Richmond v. ONEOK, Inc., 120 F. 3d 205, 209 (10th Cir. 1997) (three month period insufficient to establish a causal connection); Grizzle v. Travelers Health Network, Inc., 14 F. 3d 261, 268 (5th Cir. 1994) (lapse often months between protected activity and subsequent adverse employment action suggests that retaliatory motive was "highly unlikely")

Defendants argue that even if Plaintiff were to establish a prima facie case of retaliation, Defendants had a legitimate, non-discriminatory reason for the employment action of which Plaintiff complains. Plaintiff was soliciting employees and diagnosing patients' problems and giving them

Page 33 of 36

medical advice despite warnings not to do so. Plaintiff had been warned that continuing such actions was grounds for dismissal. The failure of a subordinate to follow the direct order of a supervisor is a legitimate nondiscriminatory reason for discharging that employee. Accordingly, in a case in which the employer has articulated a rational justification for terminating an employee, the task of proving pretext becomes quite difficult. Chancy v. New Orleans Public Facility Management, Inc., 179 F. 3d 164, 168 (5th Cir. 1999).

Defendants argue Plaintiff's direct refusal to follow the direct orders of her employer, despite numerous warnings to do so, was justifiable grounds to terminate Plaintiff. Plaintiff's termination was based on her failure to follow the orders of her employer. Defendants, therefore, argue Plaintiff has failed to show pretext, or that "but for" her EEOC charge, she would not have been terminated. As such, Plaintiff's claim of retaliation must fail and Defendants are entitled to summary judgment on Count 5 of Plaintiff's Title VII retaliation claims.

IV. CONCLUSION

The Court recognizes that Plaintiff had in mind the best interests of her patients and the Hospital when she attempted to assist patients and doctors with the diagnosis of x-rays and CAT scans and when she filed her Whistleblower lawsuit. Plaintiff was employee of Titus County Memorial Hospital for sixteen years and worked full-time in the Radiology Department as a CAT Scan Technologist. She is a 1973 graduate of the Parkland Memorial Hospital School of X-ray where she was the outstanding scholastic student and received the Mallinckrodt Award for outstanding performance. In the State of Texas, Plaintiff is licensed through the Texas Department of Health as a Medical Radiologic Technologist to work in Radiology. Plaintiff is listed on the post primary CT registry of the ARRT. On performance evaluations, Plaintiff received high marks for

Page 34 of 36

the quality of her radiographs.

The Court nevertheless must find Plaintiff's claim of violation of her right to free speech under Counts 1 and 2 of the Third Amended Petition fails as Plaintiff's "speech" was a matter of personal opinion and benefit, not a matter of public concern. Plaintiff failed to identify specific "speech" which she believes was protected. Furthermore, any interest Plaintiff may have had in diagnosing patients and soliciting employees is outweighed by the hospital's interest in protecting its patients from someone not authorized to make medical diagnoses and in promoting hospital efficiency.

Plaintiff's claim of violation of her due process rights under Count 3 of the Third Amended Petition resulting in the deprivation of her constitutionally protected property interest in continued employment fails. Plaintiff did not have an employment contract or agreement of any kind with Defendants. Plaintiff did not have a protected interest, and, therefore, no process was due.

Furthermore, Plaintiff's failure to prove a U.S. Constitutional Amendment I claim is fatal to a substantive due process claim.

Plaintiff's claim of violation of Title VII by alleged discrimination under Count 4 of the Third Amended Petition because of her sex also fails as Plaintiff has not stated any specific facts showing a genuine issue or that Plaintiff was treated differently than male employees in similar circumstances. Plaintiff's claim of sex discrimination relating to her failure to be promoted to the Lead Tech position also fails. First, Plaintiff has not shown there was any new position created. Second, Plaintiff has not shown that she was discriminated against because of her sex rather than decisions, made based upon her qualifications and ability to work with others.

Page 35 of 36

Lastly, Plaintiff's claim of Title VII retaliation for exercising her right of free speech under Count 5 of the Third Amended Petition fails as the Plaintiff has not shown her speech qualified for protection in that it was a matter of private rather than public concern. The disruptive nature of Plaintiff's speech outweighed any interest she may have had in making such speech. Additionally, Plaintiff's claim of retaliation for filing an EEOC claim fails as Plaintiff has not shown she would not have been terminated "but for" her filing the EEOC claim.

Based on the foregoing, the Court therefore **ORDERS** that Defendants' Motion for Summary Judgment, filed April 28, 2004 (Dkt. No. 88) is **GRANTED**.

SIGNED this 22nd day of July 2004.

David Folsom

DAVID FOLSOM

UNITED STATES DISTRICT JUDGE

Page 36 of 36

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41101

U. S. Court of Appeals
FILED
June 1, 2005
Charles R. Fulbruge III
Clerk

JOAN CAROL ELLIS ROBERTS,
Plaintiff-Appellant,

v.

TITUS COUNTY MEMORIAL HOSPITAL; GEORGE BURNS,
Director of Radiology Titus County Memorial Hospital; GENE
LOTT, Director of Human Resources Titus County Memorial
Hospital,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas, Texarkana

ON PETITION FOR REHEARING

Before JONES, BARKSDALE, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is *denied*.

ENTERED FOR THE COURT:

Edith H. Jones

United States Circuit Judge

REHG - 2

CLERK'S NOTE:

SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

APPENDIX 4

TITUS REGIONAL MEDICAL CENTER

TITUS COUNTY MEMORIAL HOSPITAL

[APP 4A]

BOARD OF MANAGERS BYLAWS

ARTICLE I - OFFICES:

The name of the hospital shall be "Titus County Memorial Hospital". It shall be operated by the Titus Regional Medical Center. The principal office of the hospital and the hospital district shall be at 2001 North Jefferson Street in Mount Pleasant, Texas.

ARTICLE II - PURPOSE:

The general purpose of the hospital is to provide for the care of persons suffering from illness or injuries that require emergency and inpatient care; to carry on any education activities related to rendering care to the sick and injured or the promotion of health which, in the opinion of the Board of Managers, may be justified by the facilities, personnel, funds or other requirements that are or can be made available; to promote and carry on scientific research related to the care of the sick and injured insofar as in the opinion of the Board of Managers such research can be carried on in or connection with the hospital; and to participate, so far as circumstances may warrant, in any activity designed and carried on to promote the general health of the community.

Section 1. Titus County Memorial Hospital is a nonprofit hospital.

A. It shall operate exclusively for nonprofit reasons. No part of its net earnings shall inure to the benefit of any officer, manager or private individual, or shall it ever declare or make to any such person or persons any dividend or other distribution.

B. Nothing herein shall prevent reimbursement of actual and necessary traveling and other expenses incurred in connection with the operations of the hospital.

C. All officers and members of the Board of Managers will be held harmless for the acts while performing their duties as members or officers of the Board of Managers of Titus County Memorial Hospital. The Board may purchase and provide the Managers with liability insurance the Board considers necessary or advisable to protect the Managers from risks that might result from serving on the Board.

TITUS REGIONAL MEDICAL CENTER BOARD OF MANAGER BYLAWS

Adopted: April 2, 1990 Amended: September 16, 1991 Amended: September 17, 1990 Amended: January 15, 1996 Amended: May 6, 1991 Amended: February 24, 2003

PAGE NO. 1

ARTICLE III - BOARD OF MANAGERS

Section 1. The Board of Managers shall consist of seven (7) members, who shall be elected by the qualified voters of Titus County, Texas. Managers shall be elected with one Manager elected from the area of each commissioner's precinct in Titus County and three Managers elected from the District At Large. Of the candidates for Manager for a precinct, the one receiving the highest number of votes in the precinct is elected as the Manager for that precinct, and of the candidates for Manager for the District At Large, the three receiving the highest number of votes in the district are Managers for the District At Large.

Section 2. The appropriate number of Managers shall be elected for four-year (4) terms on the first Saturday in May each even-numbered year. The Board of Managers shall order an election of Managers, provide for clerks, give notice of the election, canvass the returns, and declare the results in the manner provided by Section 1 of this Section. A person desiring to have his name

printed on the ballot as a candidate for Manager shall file with the Secretary of the Board, at least thirty-five (35) days before the election of Managers, a petition signed by at least ten (10) qualified voters residing in the district, asking that his name be printed on the ballot as a candidate to represent a specific precinct area or the district at large. A candidate for Manager must be a resident of the district and a candidate for the Manager for a precinct area must be a resident of that precinct.

Section 3. The election of the Board of Managers scheduled before the effective date of HB 1724 to be held in May, 1990, must be held and the Managers elected at that election shall serve a two-year (2) term.

Section 4. The election of the Board of Managers scheduled before the effective date of HB 1724 to be held in May, 1991, must be held and the Managers elected at that election shall serve until the Managers elected in May, 1994 take office.

Section 5. The Managers elected at the election to be held in May, 1992 and May, 1994 shall serve four-year (4) terms.

Section 6. The Chief of the Medical Staff of the principle hospital in the district shall serve as a non-voting, ex-officio member of the Board of Managers.

Section 7. A vacancy in the Office of Manager, other than an ex-officio member, shall be filled for the unexpired term by the remaining officers of the Board as provided by the laws of this State.

TITUS REGIONAL MEDICAL CENTER BOARD OF MANAGER BYLAWS

Adopted: April 12, 1990 Amended: September 16, 1991 Amended: September 17, 1990 Amended: January 15, 1996 Amended: May 6, 1991 Amended: February 24, 2003

PAGE NO.2

Section 8. Four (4) members of the Board, not including the ex-officio member, shall constitute a quorum, and a concurrence of a majority of the voting members present is required on all matters pertaining to the business of the district.

Section 9. Failure of any member of the Board of Managers to attend three (3) consecutive regular meetings of the Board shall cause a vacancy in the office, unless such absence is excused by formal action of the Board as provided by the laws of this State.

Section 10. The duties of the Board of Managers shall be to manage, control and administer the hospital or hospital system of the hospital district. **The Board of Managers shall have the power and authority to sue and be sued and to promulgate rules and regulations for the operation of the hospital or hospital system.** (emphasis added)

Section 11. The Board of Managers shall have the authority to employ under terms prescribed by the Board such employees of every kind and character as may be deemed advisable for the efficient operation of the hospital or hospital system.

TITUS REGIONAL MEDICAL CENTER BOARD OF MANAGER BYLAWS

Adopted: April 2, 1990 Amended: September 16, 1991 Amended: September 17, 1990 Amended: January 15, 1996 Amended: May 6, 1991 Amended: February 24, 2003

PAGE NO.3

ARTICLE V - OFFICERS & COMMITTEES:

Section 1. From among its' members, the Board shall choose a Chairman who shall preside, or in his absence a Vice-Chairman shall preside, and the Administrator or any member of the Board may be elected Secretary.

Section 2. As soon as practical following the election, the Chairman shall appoint the following committees:

A. Joint Conference Committee - This committee is composed of the Chairman, Vice Chairman, one other member of the Board, the Administrator, Assistant Administrator and the (5) members of

the Medical Staff Executive Committee and up to (5) additional Medical Staff members as appointed by the chairman. The Joint Conference Committee will meet as needed. (Amended February 24, 2003.)

B. Building Committee - This committee is composed of up to three (3) members but no less than (two)2 of the Board, Administrator, and Assistant Administrator. The Building Committee will meet as needed, but at least semi-annually. This committee reviews and makes recommendations to the Board of programs, policies and projects related to building, construction and grounds.

C. Executive Committee - This committee is composed of the Chairman, ViceChairman, one other Board Member, Administrator, and Assistant Administrator. The Executive Committee will meet as needed. This committee reviews any and all matters requiring action between regular and special Board Meetings and acts as an advisory committee which reviews and makes recommendations to the Board of matters related to legal,

personnel, organizational structure and Bylaws.

D. Finance Committee - This committee is composed of three (3) members of the Board, the Administrator, the Assistant Administrator, and the Director of Financial

TITUS REGIONAL MEDICAL CENTER BOARD OF MANAGER BYLAWS

Adopted: April 2, 1990 Amended: September 16, 1991 Amended: September 17, 1990 Amended: January 15, 1996 Amended: May 6, 1991 Amended: February 24, 2003

PAGE NO. 4

Services. The Finance Committee will meet at least annually. This committee reviews and makes recommendations to the Board on all matters related to finance and equipment and to transact the banking business for the Board related to notes, certificates of

deposits, leases, bank accounts, tax funds and bonds. The Chairman of the Board shall be an ex-officio member of all Board Committees.

ARTICLE VI - DUTIES OF OFFICERS

Section 1. The Chairman of the Board shall preside at all meetings of the Board of Managers. He shall in general supervise all the business affairs of the hospital district. He may sign with the Secretary or any other proper officer authorized by the Board of Managers any deeds, bonds, mortgages, contracts or other instruments which the Board of Managers have authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the Board of Managers, or by these Bylaws, or by statute to some other officer or agent of the district. He shall, in general perform all duties incident to the office of Chairman and such other duties as may be prescribed by the Board of Managers from time to time. Given the fact that the Chairman is elected from the Board of Managers, and has previously been elected to his position on the Board of Managers

by the voters of Titus County, and in accordance with the state law, the Chairman may vote on any and all issues. (AMENDED MAY 6, 1991)

Section 2. In the absence of the Chairman or in the event of his inability or refusal to act, the Vice-Chairman shall perform the duties of the Chairman, and when so acting shall have all the powers of and be subject to all the restrictions upon the Chairman. The Vice-Chairman shall perform such other duties as may be assigned him by the Chairman or by the Board of Managers.

Section 3. The Board shall require the Secretary to keep suitable records of all proceedings of each meeting of the Board. Such records shall be read and signed after each meeting by the Chairman of the member presiding and attested by the Secretary.

The Board shall have a seal on which shall be engraved the name of the hospital district, and said seal shall be kept by the Secretary and used in authentication of all acts of the Board.

TITUS REGIONAL MEDICAL CENTER BOARD OF MANAGER BYLAWS

Adopted: April 2, 1990 Amended: September 16, 1991 Amended: September 17, 1990 Amended: January 15, 1996 Amended: May 6, 1991 Amended: February 24, 2003

PAGE NO. 5

ARTICLE XI - ADMINISTRATOR

The Board of Managers shall appoint, under terms prescribed by the Board, a general manager to be known as the Administrator of the hospital district. The Administrator shall receive such compensation as may be fixed by the Board. The Administrator shall be subject to removal at any time by the Board. The Administrator, shall, before entering into the discharge of his duties, execute a bond payable to the district, in the amount of not

less than ten thousand dollars (\$10,000), conditioned that he shall well and faithfully perform the duties required of him and containing such other conditions as the Board may require. **The Administrator shall perform all duties which may be required of him by the Board, and shall supervise all of the work and activities of the district and have general direction of the affairs of the district, within such limitations as may be prescribed by the Board. He shall be a person qualified by training and experience for the position of Administrator. (emphasis added)**

TITUS REGIONAL MEDICAL CENTER BOARD OF MANAGER BYLAWS

Adopted: April 2, 1990 Amended: September 16, 1991 Amended: September 17, 1990 Amended: January 15, 1996 Amended: May 6, 1991 Amended: February 24, 2003

PAGE NO. 6

As soon as practical after the close of the fiscal year, the Administrator shall report to the Board of Managers, by a full sworn statement, of all monies received and how disbursed or otherwise disposed of He shall make a detailed report of operations of the district for the fiscal year. He shall prepare for the approval of the Board an annual budget and shall perform any and all other duties assigned him by the Board of Managers. **He shall supervise the work of all employees and shall assign to the employees their respective tasks and duties and also may dismiss any employee for good cause and shall thereafter make a report to the Board of the dismissal. (emphasis added)**

TITUS REGIONAL MEDICAL CENTER BOARD OF MANAGER BYLAWS

Adopted: April 2, 1990 Amended: September 16, 1991 Amended: September 17, 1990 Amended: January 15, 1996 Amended: May 6, 1991 Amended: February 24, 2003

PAGE NO. 7

ARRT Standards of Ethics (emphasis added)

Effective: July 2001

[App 4 B]

PREAMBLE

The *Standards of Ethics* of The American Registry of Radiologic Technologists shall apply solely to persons holding certificates from ARRT who either hold current registrations by ARRT or formerly held registrations by ARRT (collectively, "Registered Technologists"), and to persons applying for examination and certification by ARRT in order to become Registered Technologists ("Applicants"). The Standards of Ethics are intended to be consistent with the Mission Statement of ARRT, and to promote the goals set forth in the Mission Statement.

A. CODE OF ETHICS : The Code of Ethics forms the first part of the Standards of Ethics. The Code of Ethics shall serve as a guide by which Registered Technologists and Applicants may evaluate their professional conduct as it relates to patients, health care consumers, employers, colleagues and other members of the health care team. The Code of Ethics is intended to assist Registered Technologists and Applicants in maintaining a high level of ethical conduct and in providing for the protection, safety and comfort of patients. **The Code of Ethics is aspirational.**

1. The radiologic technologist conducts herself or himself in a professional manner, responds to patient needs and supports colleagues and associates in providing quality patient care.

2. The radiologic technologist acts to advance the principle objective of the profession to provide services to humanity with full respect for the dignity of mankind.

3. The radiologic technologist delivers patient care and service unrestricted by the concerns of personal attributes or the nature of the disease or illness, and without discrimination on the basis of sex, race, creed, religion or socioeconomic status.

4. The radiologic technologist practices technology founded upon theoretical knowledge and concepts, uses equipment and accessories consistent with the purposes for which they were designed, and employs procedures and techniques appropriately.

5. The radiologic technologist assesses situations; exercises care, discretion and judgment; assumes responsibility for professional decisions; and acts in the best interest of the patient.

6. The radiologic technologist acts as an agent through observation and communication to obtain pertinent information for the physician to aid in the diagnosis and treatment of the patient and recognizes that interpretation and diagnosis are outside the scope of practice for the profession.

7. The radiologic technologist uses equipment and accessories, employs techniques and procedures, performs services in accordance with an accepted standard of practice, and demonstrates expertise in minimizing radiation exposure to the patient, self and other members of the health care team.

8. The radiologic technologist practices ethical conduct appropriate to the profession and protects the patient's right to quality radiologic technology care.

9. The radiologic technologist respects confidences entrusted in the course of professional practice, respects the patient's right to privacy and reveals confidential information only as required by law or to protect the welfare of the individual or the community.

10. The radiologic technologist continually strives to improve knowledge and skills by participating in continuing education and professional activities, sharing knowledge with colleagues and investigating new aspects of professional practice.

APPENDIX 5

TITUS REGIONAL MEDICAL CENTER

TITUS COUNTY MEMORIAL HOSPITAL

2001 N. Jefferson Mt. Pleasant, Texas 75455 903-577-6000

TITUS COUNTY EMERGENCY MEDICAL SERVICE

NORTHEAST TEXAS RURAL HEALTH CLINIC

TITUS REHABILITATION CENTER

CENTER FOR WOMEN'S HEALTH

COMMUNITY PRENATAL CLINIC

SKILLED NURSING FACILITY

[APP 5A]

TO: Joan Roberts
FROM: Gene Lott, V. P.
Human Resources
DATE: June 14, 2002

On April 10, 2002, you received two different written final warnings. The subject areas covered in that counseling were solicitation of employees, on call responsibility and diagnosing patients' problems and giving them medical advice.

Since that meeting on April 10, 2002, you have violated the terms of that counseling session. Our information reflects that not only did you violate these terms, you violated them several times in the areas of soliciting employees and diagnosing patients' problems and giving medical advice.

As a result of these willful violations we are terminating your employment with TRMC effective immediately.

Employee

E. E. Lott

Vice President of Human Resources

George Burns

Witness

6/14/02

Date

TITUS COUNTY HOSPITAL DISTRICT

CHAPTER 298⁵⁵

[APP 5 B]

H. B. No. 786

An Act authorizing the creation of a Hospital District comprising all of Titus County, Texas, and the assumption of all outstanding indebtedness of Titus County incurred for hospital purposes; providing said District shall assume responsibility for medical and hospital care for the needy residing within the District; providing that such District shall not be created until authorized by a majority vote of the qualified property taxpaying electors in said District at an election called by the Commissioners Court on its own motion or upon petition; prescribing the form of the ballot for said election; authorizing the levy of a tax by said District not exceeding seventy-five cents (75¢) on the One Hundred Dollar valuation of taxable property for the purpose of maintaining and operating a hospital or hospitals and making additions and improvements thereto; providing the method of assessing and collecting taxes; authorizing the issuance of bonds by the District and prescribing the procedure therefor; authorizing the issuance of refunding bonds by the District; authorizing the conveyance of all hospital properties by Titus County to the Hospital District; **providing for the appointment of a Board of Hospital Managers for said District and prescribing its powers and duties;** authorizing the establishment of a retirement system for employees of the District; granting the power of eminent domain to the District; providing for the selection of a depository for funds of the District; **prescribing duties of officers of the District and other officers of the County and State with respect to the District;** prohibiting the levy of any tax by Titus County or any city therein, for hospital purposes after the creation of the District; making bonds of the District eligible for investment of certain funds and (emphasis added)

as security for certain deposits; making a finding that local notice has been properly given; providing a saving clause; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. In accordance with the provisions of Article IX, Section 9, Constitution of the State of Texas, this Act shall be operative so as to authorize the creation, establishment, maintenance and operation of a Hospital District within the State of Texas, to be known as Titus County Hospital District, and the boundaries of said District shall be coextensive with the boundaries of Titus County (hereinafter referred to as the "County"), and said District shall have the powers and responsibilities provided by the aforesaid Constitutional provision.

Sec. 2. That said District hereby provided for shall assume full responsibility for providing medical and hospital care for the needy residing within the District; provided, however, that such Hospital District shall not be created unless and until an election is duly held in said County for such purpose, which said election may be initiated by the Commissioners Court upon its own motion or upon a petition of fifty (50) resident qualified property taxpaying voters, to be held not less than thirty (30) days from the time said election is ordered by the Commissioners Court. At such election there shall be submitted to the qualified property taxpaying voters the proposition of whether or not a Hospital District shall be created in the County; and a majority of the qualified property taxpaying electors participating in said election voting in favor of the proposition shall be necessary. The ballots for said election shall have printed thereon:

"FOR the creation of a Hospital District; providing for the levy of a tax not to exceed seventy-five cents (75¢) on the One Hundred Dollar val

⁵⁵ Vernon's Ann. Civ. St. art. 4494-q - 17.

Tex. Sess. L. '63 Bd. Vol. - 70

TITUS REGIONAL MEDICAL CENTER EMPLOYEE
COUNSELING RECORD - PAGE 1

DATE 3-4-02

EMPLOYEE NAME Joan Roberts
TITLE C.T. TECHNOLOGISTS
DEPARTMENT RADIOLOGY
SHIFT 1

[APP 5 C]

INSTRUCTIONS:

1. MAY BE TYPED OR HANDWRITTEN (PRINT CLEARLY).
2. SECTIONS SHOULD BE COMPLETED IN NUMERICAL ORDER.
3. PROVIDE & COMPLETE FACTS OF PROBLEM, VIOLATION OR DEFICIENCY.
4. SIGN FORM IN SPACE PROVIDED.
5. REQUEST EMPLOYEE TO MAKE ANY COMMENTS DESIRED AND SIGN IN SPACE PROVIDED FOR EMPLOYEE (SECTION IV). IF THE EMPLOYEE REQUIRES ADDITIONAL SPACE USE ADDITIONAL SECOND SHEETS (SECTION V) AND MAKE APPROPRIATE ENTRIES IN PAGE NUMBER AREA.
6. AFTER COMPLETION PROVIDE EMPLOYEE WITH DUPUCATE COPY.
7. IF MULTIPLE SHEETS ARE USED, BOTH THE SUPERVISOR'S AND EMPLOYEE'S SIGNATURE MUST APPEAR ON EACH SHEET.

SUPERVISOR/DEPARTMENT HEAD STATEMENT OF PROBLEM, VIOLATION, OR DEFICIENCY:

Interpreting (or giving your opinion) of C.T. scans to physicians
is out of your "scope" of practice - this is not
the first time you have been told about this. If ask
what you found you are to direct them to the
radiologist. See attached ARRT standards of ethics.

Feb 28

This happened twice on yesterday. Also a patient
reported that you advised her not to follow her
physicians advice. Discussing and/or advising a pt.

TYPE OF ACTION: ☐ WRITTEN WARNING ☐ SUSPENSION
☒ VERBAL WARNING ☐ PROBATION ☐ TERMINATION

George Burns R. T. (R)

SUPERVISOR/DEPT. HEAD SIGNATURE

GEORGE BURNS DIRECTOR

RADIOLOGY

NAME AND TITLE

(PRINT OR TYPE)

EMPLOYEE STATEMENTS/COMMENTS:

The above stated allegations are improper in that they are
general and vague complaints which fail to specify the specific
acts of conduct, statements, ect. that are complained of and would
allegedly (continued next page)

A COPY OF THIS COUNSELING RECORD
HAS BEEN RECEIVED

AND CONSISTS OF A TOTAL
OF ____ PAGES.

Joan Roberts R.T.

SIGNATURE OF EMPLOYEE

ORIGINAL: TO PERSONNEL ASSISTANT COPY: TO EMPLOYEE

TITUS REGIONAL MEDICAL CENTER EMPLOYEE
COUNSELING RECORD - PAGE 1

DATE 3-4-02

EMPLOYEE NAME Joan Roberts

TITLE C.T. TECHNOLOGISTS

DEPARTMENT RADIOLOGY

SHIFT 1

[APP 5 C]

INSTRUCTIONS:

1. MAY BE TYPED OR HANDWRITTEN (PRINT CLEARLY).
 2. SECTIONS SHOULD BE COMPLETED IN NUMERICAL ORDER.
 3. PROVIDE & COMPLETE FACTS OF PROBLEM, VIOLATION OR DEFICIENCY.
 4. SIGN FORM IN SPACE PROVIDED.
 5. REQUEST EMPLOYEE TO MAKE ANY COMMENTS DESIRED AND SIGN IN SPACE PROVIDED FOR EMPLOYEE (SECTION IV). IF THE EMPLOYEE REQUIRES ADDITIONAL SPACE USE ADDITIONAL SECOND SHEETS (SECTION V) AND MAKE APPROPRIATE ENTRIES IN PAGE NUMBER AREA.
 6. AFTER COMPLETION PROVIDE EMPLOYEE WITH DUPUCATE COPY.
 7. IF MULTIPLE SHEETS ARE USED, BOTH THE SUPERVISOR'S AND EMPLOYEE'S SIGNATURE MUST APPEAR ON EACH SHEET.
-

SUPERVISOR/DEPARTMENT HEAD STATEMENT OF PROBLEM, VIOLATION, OR DEFICIENCY:

regarding treatment is clearly out of your scope of practice. If you
continue to advise physicians & patients regarding outcomes
or treatment you may be terminated.

TYPE OF ACTION: ☒ WRITTEN WARNING ☐ SUSPENSION
☐ VERBAL WARNING ☐ PROBATION ☐ TERMINATION

George Burns GEORGE BURNS DIRECTOR
SUPERVISOR/DEPT. HEAD SIGNATURE NAME AND TITLE
(PRINT OR TYPE)

EMPLOYEE STATEMENTS/COMMENTS:

(continued from page one)

support this claim, therefore in its entirety I cannot respond.

A COPY OF THIS COUNSELING RECORD
HAS BEEN RECEIVED

AND CONSISTS OF A TOTAL
OF 3 PAGES.

Joan Roberts R.T.
SIGNATURE OF EMPLOYEE

ORIGINAL: TO PERSONNEL ASSISTANT COPY: TO EMPLOYEE

stations. I went to Dr. Aydelott to explain the situation and explained to him we could still scan using a different setting. He wanted me to cancel the patients. I explained what we had on the schedule and I felt we could work around the problem because some of the patients had already drank their prep. He still wanted me to cancel the patients. Darrell arrived as I was canceling the patients and I informed him of the situation. He went and talked to Dr. Aydelott and then came back and said Dr. Aydelott does not want the patients cancelled.

80. Attached to this counsel in March, was an attached copy of the ARRT Code of Ethics with ARRT #6 highlighted.

81. Mr. Burns made no oral explanations. The statements in the counsel were vague and ambiguous and conclusory, to me. I responded in writing because whenever I spoke I was always regarded in some negative manner as evidenced by the grievance response letters. I asked for specifics and was never given any.

82. On 3-6-02, Darrell was sitting at the scanner and I was next to him. The phone rang and I answered it. It was Dr. Aydelott and he ask me if Darrell was there and I said yes. He ask if he could speak to Darrell. I said sure and I gave the phone to Darrell. Darrell said "Ok" on the phone and then gave it to me to hang up. Darrell then said to me, "Dr. Aydelott wants to see you." I went into his office and Dr. Aydelott said to me "Don't put the x-ray jackets on that stool, put them on my desk." The stool butted up next to the desk and is was

[App 5 D]

[APP 5 B]

vs.

COME NOW Defendants, Titus County Memorial Hospital ("Titus"), George Burns, and Gene Lott, moving for Summary Judgment under F.R.C.P. 56 and would show the Court as follows:

The Plaintiff was employed with Defendant, Titus County Memorial Hospital, in Mt. Pleasant, Texas from April, 1986 until her employment was terminated on June 14, 2002 due to Plaintiff's refusal to abide by the policies of her employer despite warnings given to Plaintiff on several occasions.

Plaintiff alleges deprivation of the Plaintiff's rights of free speech under the First and Fourteenth Amendments of the United States Constitution in violation of 42 U.S.C. § 1983 by (1) Defendant's implementation of a departmental policy entitled ARR T #6 which prohibited Plaintiff

Defendant's Motion for Summary Judgment

Page 1

from diagnosing and giving medical advice; (2) Defendant's policy regarding solicitation which prohibited the Plaintiff from soliciting employees while she or the employees were on the job; and (3) a final letter of warning to discontinue the actions of diagnosing patients and solicitation.

III.

Plaintiff claims she had a constitutional right to diagnose and give medical advice. Plaintiff also claims she had the constitutional right to solicit information from employees while on duty to help her in a lawsuit filed under the Texas Whistleblower laws. Plaintiff had a lawsuit pending in the District Court in and for Titus County, 76/276th Judicial District, Cause No. 29675 for alleged violations of the Texas Whistleblower Act on which the Court recently granted Defendant summary judgment. All allegations of Plaintiff relating to these alleged violations have been addressed in that lawsuit.

IV.

Plaintiff further alleges that she was deprived of her Due Process rights under the First and Fourteenth Amendments of the United States Constitution in violation of 42 U.S.C. § 1983 by the exercise of "the established policies and customs" of the ARRT #6 policy relating to the standard of conduct of radiologic technologists and the Defendant's policy against solicitation while at work.

V.

Plaintiff also alleges she was intentionally discriminated against because of her sex in violation of Title VII, creating an abusive hostile work environment for (1) exercising her rights to free speech, and (2) filing an EEOC charge of sex discrimination. Plaintiff claims an abusive hostile work environment was created by: (1) George Burns' association with Dr. Davis, Dr. Aydlelott, Adam Larson, Gene Lott, Steve Jacobson, Darrell Beck and Francis Standridge; (2) reprimanding

Plaintiff in March and April; (3) unfavorable performance reviews; (4) creation of a new position of Lead CAT Scan Tech and awarding the position to Darrell Beck; (5) unequal treatment of Plaintiff by treating Plaintiff's male co-worker with different "communicative efforts" and giving the male co-worker "privileges and professional courtesies not afforded plaintiff;"; (6) Defendant's policy addresses only sexual harassment and not nonsexual discrimination motivated by gender bias; (7) Defendant's EEOC policy refers to employees, not employers; and (8) George Burns' violation of Title VII by creating a discriminatory abusive work environment in treating male co-workers differently than Plaintiff.

VI.

Plaintiff additionally alleges she was retaliated against in violation of Title VII for making an EEOC charge of sex discrimination on December 18, 2001.

VII.

This motion is supported by a brief; deposition excerpts of Plaintiff; deposition excerpts of Edward Eugene Lott; Deposition excerpts of George Burns; letter of termination; copy of EEOC charge; ARRT Policy; memo regarding solicitation of employees; April 9, 2002 letter to Plaintiff regarding recent problems; Grievance Response from Frances Standridge; Letter to George Burns from Dr. Aydelott and Dr. Davis dated September 20, 2001; memo to technologists from George Burns dated September 21, 2001; letter from Dr. Davis to Burns dated April 9, 2001; memo from Jacobson to Roberts dated January 8, 2002; Plaintiff's Performance Evaluation dated November 23, 2002; Plaintiff's Performance Evaluation dated March 13, 2001; Comprehensive Treatment Plan of Plaintiff dated September 8, 1992 and notes dated September 22, 1992; Employee Counseling Record dated 6/7/01; and Employee Counseling Record dated 3/4/02.

VIII.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, there are no genuine issues as to any material fact as to the claims asserted by the Plaintiff. Plaintiff's claim of violation of her right to free speech must fail as Plaintiff's "speech" was a matter of personal opinion and benefit, not a matter of public concern. Plaintiff also failed to identify specific "speech" which she believes was protected. Furthermore, any interest Plaintiff may have had in diagnosing patients and soliciting employees is far outweighed by the hospital's interest in protecting its patients from someone not authorized to make medical diagnoses and in promoting hospital efficiency.

Plaintiff's claim of violation of her due process rights resulting in the deprivation of her constitutionally protected property interest in continued employment must fail. Plaintiff did not have an employment contract or agreement of any kind with Titus. Texas courts have made it very clear that in order for an employee to have a protected property interest, there must be an agreement between the parties. Plaintiff did not have a protected interest, and, therefore, no process was due. Furthermore, Plaintiff's failure to prove a U.S. Constitutional Amendment I claim is fatal to a substantive due process claim.

Plaintiff's claim of violation of Title VII by alleged discrimination against because of her sex must also fail as Plaintiff has not stated any specific facts showing a genuine issue or that Plaintiff was treated differently than male employees in similar circumstances. Plaintiff's claim of sex discrimination relating to a promotion fails for several reasons. First, Plaintiff has not shown there was any new position created. Second, Plaintiff has not shown that she was discriminated against

because of her sex rather than decisions made based upon her qualifications and ability to work with others.

Lastly, Plaintiff's claim of retaliation for exercising her right of free speech must fail as the Plaintiff has not shown her speech qualified for protection in that it was a matter of private concern rather than public concern, and the disruptive nature of Plaintiff's speech outweighed any interest she may have had in making such speech. Additionally, Plaintiff's claim of retaliation for filing an EEOC claim fails as she has not shown that she would not have been terminated "but for" her filing the EEOC claim. Plaintiff was terminated for refusing to follow her employer's instructions to refrain from diagnosing patients, giving medical advice, and soliciting employees for her lawsuit while on duty despite repeated warnings to do so. Insubordination is a legitimate, non discriminatory reason for termination.

Plaintiff has failed to prove all the elements necessary for her claims.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this Court grant their Motion for Summary Judgment and further grant any and all other relief to which they may be justly entitled whether at law or in equity.

Respectfully submitted,

Louise Tausch

Louise Tausch, Attorney-in-Charge
Texas State Bar No. 19680600
Arkansas Bar No. 86212
E-mail: ltausch@arwhlaw.com

Jeffery C. Lewis
Texas State Bar No. 12280950
Arkansas Bar No. 91098
E-mail: jlewis@arwhlaw.com

REQUEST 7:

Produce all documents that show plaintiff did not timely file a charge of discrimination with the Equal Employment Opportunity Commission.

[APP 5 F]

RESPONSE:

Defendants object on the grounds that this seeks to require the responding parties to marshal all of their available proof or the proof the parties intend to offer at trial. Defendants object to the extent this invades the attorney client privilege; the attorney work product privilege; and the investigative privilege. Without waiving said objections, Defendants have previously produced numerous documents to the Plaintiff including her personnel file, counselings, and correspondence, regarding this claim and Plaintiff's other claims. Also, the depositions of George Burns and Gene Lott have been taken and Plaintiff has access to the same. Finally, Defendants would refer Plaintiff to their Initial Disclosures and all supplemental disclosures.

REQUEST 8:

Produce all documents that show the form and content of the speech that is the basis of this lawsuit.

RESPONSE:

Defendants object on the grounds that Plaintiff is requesting Defendants to prove her lawsuit. This request is overly broad, general, vague, and confusing. Defendants object to the extent this invades the attorney client privilege; the attorney work product privilege; and the investigative privilege. In addition, Plaintiff has not identified "the speech" to which she refers herein such that Defendants cannot respond appropriately without further clarification. Finally, Defendants object on the grounds that this seeks to require the responding parties to marshal all of their available proof or the proof the parties intend to offer at trial. (emphasis added)

REQUEST 9:

Produce all documents that describe the actions, conduct, or measures taken by defendants in response to plaintiff's speech.

RESPONSE:

Defendants object on the grounds that this is overly broad, general, and vague. If plaintiff will identify the speech she claims to be in issue, then Defendants may be able to respond.

Defendants object on the

1 prohibit her from talking with them, but just during—

2 THE COURT: It was simply during on-the-job hours?

3 MS. TAUSCH: Correct. Just during the time that we
4 were paying them to work for the Hospital and paying her to
5 word for the Hospital. She received two warning letters
6 describing these activities and stating that they were against
7 policy and that she needed to stop, and she did not ant that's
8 why she was terminated.

9 She claims that she had the constitutional right to
10 diagnose and give medical advice because it was in the
11 patient's best interes; however, according to the policy and
12 the laws of Texas, you can't practice medicine without a
13 licnese, Your Honor, and that's what we perceived she was
14 doing.

15 She also has a claim for sexual discrimination and a
16 hostile work environment for two things. Number one,
NUMBER ONE,
17 exercising this freedom of speech, c: so she claims, as well
18 as filing three EEOC charges of discrimination against the
19 Hospital. However, two of those charges occurred after she
20 was terminated, so those cannot contribute to a hostile work
21 environment claim. The first one was dismissed by the EEOC,
22 and I will talk about that in just a moment.
23 She also claims retaliation for filing the First EEOC
24 charge, which was dated December 18th, 2001. She was fired on
25 June 14th, 2002, more that six months later, or almost six

[APP 5 G]

[APP 5 H]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Joan Carol Ellis Roberts	§	CIVIL ACTION
PLAINTIFF	§	NO. 5:03cv21
VS.	§	JURY
1. Titus County Memorial Hospital	§	
of The Titus County Hospital District	§	
	§	U.S. DISTRICT JUDGE
2. George Burns, Individually &	§	DAVID FOLSOM
as Director of Radiology;	§	
	§	
3. Gene Lott, Individually &	§	
as Director of Human Resources	§	
DEFENDANTS	§	

AFFIDAVIT OF JOAN CAROL ELLIS ROBERTS

STATE OF TEXAS §
COUNTY OF TITUS §

Before me, the undersigned notary, on this day personally appeared Joan Carol Ellis Roberts, a person whose identity is known to me. After I administered an oath to her, upon her oath she said:

1. "My name is Joan Carol Ellis Roberts, I am over eighteen (18) years of age, of sound mind and capable of making this Affidavit. I have personal knowledge of the facts stated in this affidavit, and they are true and correct.

2. I am a citizen of the United States of America and live at 107 Fortner Lane, Mt. Pleasant, Texas.

3. I was an employee of Titus County Menorial Hospital from

Roberts Affidavit, Page 1.

April of 1986 to June 14th, 2002. I worked full time in the Radiology Department as a Cat Scan Technologist.

4. I was terminated on June 14, 2002 by Gene Lott, the Director of Human Resources with George Burns present as a witness.

5. I have never believed or stated that it was in my scope of practice to make diagnoses.

6. I have never practiced medicine.

7. I did not solicit as alleged in the letter of termination.

8. I filed a Whistleblower lawsuit on February 7, 2002 in Titus County against Titus County Memorial Hospital.

9. The hospital put a notice in the Mt. Pleasant Daily Tribune newspaper on Wednesday March 14, 2001 for bids on a CAT scan machine. Attached to this affidavit is a true and correct copy of that newspaper notice.

10. I made a report in good faith to two hospital board members, Bruce King and Rick Strudthoff.

11. I reported what I believed to be violations of the competitive bidding laws based the irregular events in the purchase of a CAT scan machine that I had witnessed.

12. Darrell Beck, the other CAT scan tech. told me the purchase order for the CAT scan machine had to be issued by friday May 4, 2001.

13. I made these reports by telephone from my home phone on Thursday night May 3, 2001, the night before the deadline.

14. My husband is witness to the phone calls and he voiced strong disapproval to me about getting involved.

Affidavit Joan Roberts, Page 2.

defendant in discovery.

52. I did not give the hospital any cause to terminate me.

53. I do not personally know of any investigation relating to the facts of my termination. I was not ever asked any information relating to any of the charges.

54. The letter of termination I received is attached to this affidavit and is a true and correct copy. I was called into George Burns office and handed the letter to read by Gene Lott.

55. Mr. Lott had two copies of the letter ready for me to sign.

56. The termination letter only gave conclusory statements and no specifics were stated orally.

57. Mr. Lott stated "I need you to sign it." I stated, "No I don't want to sign it." I then left.

58. The hospital has no post termination grievance or hearing process.

59. I sent a letter to Mr. Jacobson and asked for specific details relating to the charges. Attached to this affidavit is a true and correct copy of the letter I mailed to him dated 9-12-2002.

60. Mr. Jacobson sent me a reply and declined to give be any

specifics. Attached to this affidavit is a true and correct copy of that letter date Oct. 3, 2002.

61. I was never told orally or in writing that my speech was disruptive.

62. I was the only primary CT tech for many years at Titus county Memorial Hospital. In october of 1998 a 2nd CT tech Darrell

Affidavit Juan Roberts, Page 7.

1 MS. TAUSCH: I don't know if she is a member of that
2 organization, Your Honor, but however, we adopted that policy
3 as a policy for the Hospital technicians.

4 THE COURT: Is there a cause of action under her
5 complaint that alleges that is in some fashion
6 constitutionally or unconstitutionally vague? Have you moved
7 for summary judgment on that cause of action?

8 MS. TAUSCH: We have included that in our motion,
9 Your Honor, to state that this is not the proper course to
10 challenge that, that national policy. What she has claimed is
11 that it deprived her of freedom of speech, that's how she has
12 asserted it. And therefore, we have stated that the policy
13 does not deprive her of freedom of speech simply because --

14 THE COURT: So you have moved for summary judgment on
15 all causes of action?

16 MS. TAUSCH: Correct, Your Honor. She also complains
17 about Titus' policy against solicitation. She claims that it
18 prohibited her from soliciting employees while they were
19 working or while she was working, and that's true, it does.
20 What occurred is Ms. Roberts filed the lawsuit, two lawsuits
21 against the Hospital and two physicians in State Court. Under
22 the discovery rules she has to provide some information to us,
23 so while she was working and/or while the other employees were
24 working, she solicited information from them, talked to them
25 about her lawsuit, and went forward with that. We did not

[App 5 1]

Plaintiff in this case was soliciting employees at the hospital during working hours, disrupting the operation of the hospital, and causing complaints from other employees regarding her solicitation.¹⁵ Plaintiff continued this action, despite the fact that she had been warned against this type of behavior.¹⁶

Plaintiff claims that hospital policy which restrained her solicitation of employees and hospital policy which prohibited her making medical diagnoses and giving medical advice to patients restrained her free speech.¹⁷ However, when an employee's speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office. *Connick, Id.* Just as the court held in *Connick* that the limited First Amendment interest involved did not require the employer to tolerate action which they reasonably believed would disrupt the office, undermine authority, and destroy close working relationships and no First Amendment rights were violated, so also in this case Defendant was not required to tolerate such behavior from Plaintiff and Plaintiffs First Amendment rights were not violated.

15 Exhibit 2: Deposition excerpts of Lott (pg. 15, lines 4-9; pg. 17, lines 1-4 and lines 10-25; pg. 18, line 1)

16 Exhibit 2: Deposition excerpts of Lott (pg. 19, lines 6-9)

17 See Plaintiff's Third Amended Petition

[APP 5 J]

1 and rotate accordingly, and problems with diagnosing
2 patients. And I believe there's also -- yeah.

3 Q. Okay.

4 A. And then the second part of it was
5 soliciting employees while they're on duty while
6 either she was on duty or the employees were on
7 duty, which is unacceptable. And then a final
8 warning was given on both -- on all these
9 violations.

10 Q. Okay. Both of these warnings or memos
11 to -- were to Ms. Roberts dated April 9, 2002; is
12 that correct?

13 A. Yes, ma'am.

14 Q. And they came from you -

15 A. Yes, ma'am.

16 Q. -- correct?

17 A. Yes, ma'am.

18 Q. The first one is entitled recent problems;
19 is that right? It says, concerning recent problems?

20 A. I'm looking here.

21 Q. Okay.

22 A. Yes.

23 Q. Okay. And it -- was there a problem in
24 regard to being on call for the CT techs?

25 A. Yes. And the problem, from my

[App 5]

1 That Ms. Roberts was soliciting employees
2 to get their addresses and names, and the indication
3 was going to subpoena them as
4 witnesses --

5 Q. Okay.

6 A. -- in the case.

7 Q. So Ms. Roberts had already filed a lawsuit
8 the hospital but was still working there?

9 A. Yes.

10 Q. And during the time that she was at work
11 supposed to be working for the hospital, she was
12 engaged in -- in discussing something along those
13 lines with other employees?

14 A. Yes, ma'am.

15 Q. And were the other employees at work, too?

16 A. Yes.

17 Q. Okay. So in regard to your memo to her,
18 was it a matter of telling her not to do that while
19 she's on duty or the employees are on duty?

20 A. That is correct.

21 Q. And as director of human resources, is
22 that -- is that a reasonable thing to ask of your
23 employees, and that is that they -- that they work
24 when they're on the clock?

25 A. Yes. And we do have a no-solicitation

[APP 5]

1 policy in our handbook additionally.

2 Q. And let me show you that. I don't have a
3 copy of it. But I have a copy of your handbook
4 here, and I'll turn to Page 12. At the top, I
5 believe there are a list of serious offenses for
6 which employees can be disciplined; is that right?

7 A. Yes, ma'am.

8 Q. And solicitation is included on that?

9 A. Yes, ma'am.

10 Q. In regard to a serious offense, can that
11 bring about immediate dismissal?

12 A. If the nature of it was severe enough, yes.

13 Q. Okay.

14 A. But in most cases, we would give the
15 individual a warning. We could do a suspension and
16 a ninety-day suspension or probation or just a
17 flat-out warning - -

18 Q. Okay.

19 A. - that this must cease. And that's -
20 that's why the final warning was attached to those
21 things.

22 Q. So in this particular case, you didn't
23 fire Ms. Roberts, but you gave her warnings?

24 A. Yes.

[App 5]

1 Q. Okay. What was Ms. Roberts' reaction when
2 you talked with her about these two memos?

3 A. Somewhat unbelieving, I guess would be a
4 good word. She didn't think she had done any of
5 that.

6 Q. All right. Now, as to your knowledge, did
7 Ms. Roberts continue in the activities that you had
8 warned her not to do?

9 A. Yes, ma'am.

10 Q. All right. And there was a termination
11 letter issued to Ms. Roberts; is that correct?

12 A. Yes, ma'am.

13 Q. And did you author that termination
14 letter?

15 A. Yes, ma'am.

16 Q. Okay. And what's the date on that
17 termination letter?

18 A. June 14 of 2002.

19 Q. In your opinion as director of human
20 resources, had the hospital made every effort to
21 bring Ms. Roberts' conduct into line with acceptable
22 work performance?

23 A. Yes, ma'am. I think we went every step we
24 could take.

25 Q. And as far as your opinion, what was the

[App 5]

46. Plaintiff objects to defendants attempt to use the April 9, 2002 letter titled solicitation of employees, as probative proof that plaintiff's speech was disruptive. It is not

Plaintiff's 2nd Summary Judgment Response, Page 20.

probative of such, because it is a conclusory letter that does not state what specific speech that was found to be in violation of the solicitation policy; and how such speech interfered with the efficient function of the duties of the alleged employees.

47. Defendant cites Mr. Lott's deposition (pg. 19, lines 6-9, 19-25; pg. 20, lines 1-3) as probative proof plaintiff continued in activities that were non-specific and plaintiff objects. Plaintiff also objects to Mr. Lott's statement as being proof that he had knowledge plaintiff continued in these nonspecific activities, when he does not state what that knowledge was. Plaintiff also objects to his statement that "I think we went every step we could take" when he failed to list what steps he is referring to, or what specifically the steps were in regard to or if plaintiff had knowledge of any alleged steps.

48. Defendant cites Mr. Lott's deposition (Pg. 15, lines 4-9, Pg. 17, lines 1-4, 10-25, pg.18 line 1) as probative proof that plaintiff was soliciting when reasonable minds may differ as to whether plaintiff's actions could be termed as solicitation; plaintiff contends is it not probative proof and therefore objects. Plaintiff also objects to Mr. Lott's assumptions as not being probative as to plaintiff's motive, but contends his statement is probative of his motive. Plaintiff objects that Mr. Lott's deposition is not probative proof that plaintiff's speech was disruptive. It is not probative of such, because it does not state how such speech interfered with the efficient function of the duties of the

[App 5 K] Plaintiff's 2nd Summary Judgment Response, Page 21.

alleged employees.

Record on Appeal 1498,1499,1500

TITUS COUNTY HOSPITAL DISTRICT
GRIEVANCE PROCEDURE FORM

[App 5 L]

EMPLOYEE NAME: Joan Roberts DATE: 10-12-01
TITLE: CT Tech DEPARTMENT: Radiology
PLEASE PRESENT A BRIEF SUMMARY OF THE PROBLEM.
DATE OF OCCURRENCE: September 21, 2001

September 21, 2001, I became aware, for the first time, of a new position for a lead CT technologist. The proper procedure for filling this new position should have been to post the position on the employee bulletin board first so other employees, who might wish to advance, may have the opportunity to do so. Second, it must be advertised publicly. This procedure was never adhered to even though it is hospital policy. Therefore, I was denied the opportunity to even apply. George Burns notified me in writing, on 9-21-01, about the decision of Dr. Aydelott, Dr. Davis and himself to promote Darrell Beck to the position of lead CT technologist. In the letter, they stated that Darrel was the most qualified. I feel Darrel is the least qualified for this position based on his work performance. I have worked for this institution for 15 years and, out of respect for my work performance, I should have been given the opportunity to apply for this new position. I believe I have been discriminated against by all parties involved because of the sequence of events that took place over the purchase of new CT machines purchased in May 2001. Because I am a taxpayer in this community, I feel it is my right to talk to board members about the waste of hospital money.

I believe these actions, of the above mentioned parties, are a statement of prejudice against me.

Joan Roberts R.T.

Joan Roberts, R.T.

Record on Appeal 1571

MEMORANDUM

Date: September 21, 2000

[APP 5 M]

To: Joan Roberts R. T. ®

Darrell Beck R. T. ® (CT)

Keith Moffett R.T. ® (CT)

From: George Burns R.T. ®, Director, Radiology Services GB D
GA

RE: Changes In C. T.

The radiologists and I met yesterday to determine what new direction we wanted to take in C. T.. It was determined that we want to re-organize and have a lead technologist to "head up" the day to day operation. Patient throughput and staying on schedule are to be the top priority. Every effort is to be made to accommodate a patient desiring service in an expedient manner.

It is felt that Darrell Beck is the person most qualified and has the necessary skills to ensure that this is accomplished in an expedient, professional and friendly manner. Effective today he has been designated as "lead technologist" for C. T. Services.

Also the decision was made that oral contrast should whenever possible be Crystal Light with Gastro View. Scan C will still be kept at the front desk and be available when needed. CT personnel will mix the Crystal Light daily and the containers of Contrast should be kept both in CT and at the front desk to save time for the CT technologists. Remember each container should be labeled with the date mixed and the technologists initial.

Call schedule has been changed to allow for all three technologists to have some call time on each paycheck and also to reduce the stress of week-long call schedules.

GB:gb

Record on Appeal 1570

Memorandum

[APP 5 N]

Date: 12/10/2001

To: CT Technologists

Cc: George Burns,

From: Darrell Beck, RT, (R) (CT)

RE: Change in CT LOG

At this time we are only documenting the start time on all CT examinations, effective immediately we will be documenting the exam end time as well. It is very important that the CT log is completed thoroughly and correctly failure to do so will lead to disciplinary actions. I have attached the CT log memo for reference. If you have any questions please contact me.

Please Read and Initial

Joan Roberts

Keith Moffet

DDB

12/10/2001

Record on Appeal 1576

Memorandum

[App 5 N]

Please read
then Initial
KM
IR

Date: 10/4/2001

To: CT Technologists

Cc: George Burns,

From: Darrell Beck

RE: Early Technologist Duties

Listed are the duties for the early CT Technologist to complete each morning.

1. Check the crash, make sure the defibrillator is fired and check off sheet is completed.
2. Perform a CHECKUP on the CT Scanner, for tube warm-up and calibration.
3. Perform a Quality Check daily with the phantom. NO EXCUSES, this may change once the scanner is inspected and it is not deemed necessary to be done daily. Until then perform daily.
4. Pick up outpatient folders from the CT slot located in the black cart by the file room.
5. Ensure the front desk has enough oral contrast in the pitcher. If not then mix up 2 packets of Crystal Light and 1 bottle Gastro View to 1 gallon of water, then place a label with the date, time made and your initials on it.
6. Send oral contrast up to the floors for inpatients.

DDB

10/4/2001

Record on Appeal 1574

TITUS COUNTY HOSPITAL DISTRICT
GRIEVANCE PROCEDURE FORM

(App 50)

EMPLOYEE NAME: Joan Roberts DATE: 8-28-00

TITLE: CT Tech DEPARTMENT: X-Ray

I have been sexually discriminated against.

PLEASE PRESENT A BRIEF SUMMARY OF THE PROBLEM.

DATE OF OCCURRENCE: Numerous (see following)
sequence of events

1-1-00

New call back pay system went into effect.

When I asked Geroge Burns who decided and

why, he said a committee decided and I asked

him was he on the committee and he said yes.

I ask him did he stand up in our behalf at all

& he simply said, "I told them it wasn't going

to go over very well." End of conversation.

1-4-00 I requested a meeting with Steve Jacobson

& he said he would look into it, the call pay. I had

another meeting with Steve in the X-Ray back door

for about an hour the next month & the last time

I spoke with him was 5-25, of which he said he

hadn't focused on it yet.

June 26 I met David Neely about the issue

since it was apparent, this was 6 months going

and no discussion whatsoever unless I initiated

it.

7-10-00 I asked Darrell to go on a letter requesting

to be removed from call, he agreed. The next day

7-11, Adam & George have a meeting with Darrell.

7-12 Dr. Davis & Dr. Aydelott have a meeting with Darrell.

7-13 George called Darrell to meet with him in Administration

to discuss the call issue

Joan Roberts R.T.

with Steve & Francis. I

SIGNATURE OF EMPLOYEE

went to Steve & Francis was standing there and I asked "why was I not invited to the meeting, since this effects me just as much as it does Darrell" (over)

My question was never answered. I was only told nothing has been decide yet. That we would all have a meeting next Thursday. We never had the meeting & I was never told anything from George.

7-24 Still no word of any kind, so I requested a family leave from call on Fri Sat & Sun, so I could seek a second job to make up for pay cut because my son was assaulted & my car stolen & I had to borrow my Dad's car to take call.

7-26 George told me there was no such thing of leave of absence from call, it would be discrimination against Darrell. I told him if anybody was discriminated against it was me. He then asked to see my call time & asked me to explain.

8-11 Dr. Davis had meeting with Darrell about call.

8-15 I took my call information to show George like he asked & then he called Darrell in to meet with him & verify my statements.

8-21 I talked with Bruce King.

9-24 George talked with Darrell about call again.

8-25 Francis stopped me in the hall & said they were looking into call pay. I told her since they have drug this on 8 months I wanted retroactive pay. I worked it. She didn't know. Why should I pay for their inability to Focus? Then George called Darrell in to meet with him & Francis in the office & they tell him that they they will make the pay retro for last couple pay checks, after he said he wanted back pay.

Joan Roberts

Grievance Response

(APP 5 P)

From: Frances Standridge

A decision was made by Radiology Management that with the addition of the new CT machine, there was the need for one of the three existing CT Technologists, while remaining in his/her current position, to be assigned some additional duties, such as coordination of scheduling, emergency procedures, communications, and interpersonal relationships, so that the department would run as smoothly as possible, and to designate that person "lead tech." No new position was created, so no position was filled. There was no promotion or pay increase. There was, therefore, nothing to trigger the TRMC procedure for filling a vacant or new position. So, no application was appropriate or needed for the situation.

The Radiology Manager and the Radiologists are all familiar with the qualifications and work performance of the three CT Techs. Each of the three CT Techs was considered for these duties. Among the reasons that Darrell Beck was assigned these additional duties was his ability to expedite the patient schedule, his ability to interact effectively with the Radiologists and the radiology staff as well as the Medical Staff and other hospital departments, and his ability to communicate effectively with the patients and their families. Also among the reasons he was assigned these duties were your lack of demonstrated interpersonal skills, your demonstrated lack of respect and of cooperation with management at any level, and the fact that the needed skills for these duties assigned to Mr. Beck were not consistent with your demonstrated skills.

In review of the situation, I conclude that no notice or application procedure was triggered and that no discrimination or prejudice against you appears from the facts. I support the decision by Radiology Management to assign these duties to Darrell Beck.

Page 2

Signature Frances Standridge

Date: November 14, 2001

Division Head

1 months later. Your Honor, we cited case law in our motion for
2 summary judgment that states that time frame will not
3 establish a casual connection between the filing of the EEOC
4 charge and the retaliation claim.

5 And then finally she has some allegations in regard to
6 due process violations. In regard to the -- now I would like
7 to back up and just go over them in a little bit more detail.

8 In regard to the freedom of speech claim that she has,
9 she does not identify specifically what speech she is talking
10 about, and we have addressed that issue several times with
11 discovery, and that is required under the case law that we
12 have cited in our motion for summary judgment, that she has to
13 specifically identify the speech. However, what we have
14 gleaned from her complaint --

15 **THE COURT:** I gather she is saying generally she
16 feels she has a constitutional right to give opinions.

17 **MS. TAUSCH:** Correct.

18 **THE COURT:** And advice to patients?

19 **MS. TAUSCH:** And that's what we gleaned from her
20 complaint as well, Your Honor. However, for the freedom of
21 speech claim --

22 **THE COURT:** In other words, you are of the opinion
23 not only does she have to generally give the category of the
24 speech, but also exemplified of when this took place with patient
25 Jones --

[APP 5 Q]

Tausch. Some of the employees were at lunch, on break, walking down the hall, or at other times when I believed they were not engaged in work related activities. The needed information was requested of all possible witnesses.

124. April 9th, 2002, I scanned a CT of the abdomen and pelvis on a patient that had been admitted through the night from the ER, that had been in a car wreck. Keith Moffett arrived that morning and helped me take the patient over to X-ray for a chest x-ray and transport, to take the patient up to his room. There was wasn't anyone in sight, when Jay the Radiology R. N. came from a room. I did not want to leave the patient unattended because I believed the patient had a fractured spleen and it was not uncommon for a patient to wait 30 minutes or more to be taken up to their room. Therefore, I ask the nurse to take the patient's vital signs and stay with the patient because I believed he had a possible fractured spleen.

125. April 10, 2002, Gene Lott gave me two different written final warnings in the presence of George Burns, that were dated April 9th. There was no discussion before he gave me the letters. As he handed me the letters he stated that "After your finish reading these, I need you to sign them, signing them doesn't mean that you agree or disagree, I just need you to sign them as acknowledgment that you received them."

126. The letters were not written on the standard counsel form with individual boxes describing the type of warning was receiving with the instructions regarding the proper

[App 5 R]

documentation procedure and a place for employee responses.

127. I stated I would sign them, but that I did not agree with them. Mr. Lott then said, "That's ok, you don't have to agree with it."

128. The letters were conclusory non specific factual statements and no explanation was offered. Attached to this affidavit is a true and correct copy of the letters dated April 9, 2002.

129. June 4th, 2002, I expressed my concerns to the ER physician about a CAT scan of the head, he had me scan earlier, after he told me the CAT scan report was called to him as normal. Dr. Cole admitted the patient then and ordered a MRI the next morning with the result, the patient had a 2.5 cm. pituitary tumor.

130. June 6th, 2002, upon the ER physicians request, I showed him the CAT scan on a 20 yr. old spanish man that spoke no English. The language barrier made it hard for him to assess, but the physician told me, he was interested in the appendix and asked me what measurement I got on the appendix. I told him, 1.6 cm., of which he knew indicated a positive result. The scan was read as normal. The evening shift change between ER physicians left confusion, and the scan was repeated with the Lead CT tech Darrell Beck. His measurement was normal for an appendix and the scan was reported as normal a 2nd time. The patient was discharged, but returned the next day with a ruptured appendix and peritonitis, which required a long hospital stay due to the misdiagnosis.

[APP 5 R]

1 THE PLAINTIFF: That was the week, the -- one was
2 June 6 and one was June 4th

3 THE COURT: What was the other example?

4 THE PLAINTIFF: It was a CT of the brain I had done
5 for the ER.

6 THE COURT: A what?

7 THE PLAINTIFF: And it was -

8 THE COURT: I couldn't understand you, what?

9 THE PLAINTIFF: It was a CAT scan of the brain.

10 THE COURT: CAT scan.

11 THE PLAINTIFF: That I done to the ER, and the
12 radiologists had already gone for the day and the -- there was
13 another case just prior to that that the doctor came over, was
14 really hounding me about to talk to me about it.

15 THE COURT: Now who ... was this doctor?

16 THE PLAINTIFF: This was Dr. Cole. And I kept
17 telling him I couldn't, you know, couldn't talk to him, and
18 you know he just -- and anyway, he kept on and he left
19 finally, because I was terrified. And before I left, I was
20 getting ready to leave. Before I left I went to ask him did
21 you ever, did he ever call you any results or report or
22 whatever? And he said yes. And he said that the CT of the
23 brain was normal.
24 Well, I knew there was a big question on it, that
25 it wasn't normal, for sure wasn't normal, but exactly what was

[APP 5 S]

1 going on I wasn't for sure, didn't really know, but I new it
2 wasn't normal.

3 THE COURT: What did you do?

4 THE PLAINTIFF: Well, I felt pretty sick, and I stood
5 there for about a minute and tried to decide what I was going
6 to do because I didn't know what to do because I knew I was
7 going to be fired.

8 THE COURT: I mean, did you, did you talk to -

9 THE PLAINTIFF: And I told him that it wasn't normal.

10 THE COURT: Excuse me?

11 THE PLAINTIFF: I told him that it wasn't normal.

12 THE COURT: Did you talk to the patient about it?

13 THE PLAINTIFF: No, no, no, no. I never talk to
14 patients like that which they say I did, but I didn't.

15 THE COURT: So we are talking about two occasions,
16 June 4th and June 6th of 2002?

17 THE PLAINTIFF: Yeah. And so the doctor on that put
18 him in the hospital and did a scan on him the next day, an
19 MRI, and he had a pituitary brain tumor.

20 THE COURT: Very well. Tell me about this
21 solicitation issue. What was that about?

22 THE PLAINTIFF: Well, I don't think it was
23 solicitation at all. It is not my interpretation of what
24 solicitation is.

25 THE COURT: Tell me in your own words then what

[App 5 S]

TITUS REGIONAL MEDICAL CENTER
TITUS COUNTY MEMORIAL HOSPITAL

2001 N. Jefferson Mt. Pleasant, Texas 75455 903-577-6000
TITUS COUNTY EMERGENCY MEDICAL SERVICE
NORTHEAST TEXAS RURAL HEALTH CLINIC
TITUS REHABILITATION CENTER
CENTER FOR WOMEN'S HEALTH
COMMUNITY PRENATAL CLINIC
SKILLED NURSING FACILITY

[App 5 T]

TO: Joan Roberts
FROM: Gene Lott, Director of Human Resources
DATE: April 9, 2002
Concerning: Solicitation of Employees

We have been receiving complaints from employees in the hospital that you have been soliciting their involvement with your case while they are at work.

We cannot and will not tell you whom you can or cannot solicit but we can prohibit you from soliciting employees while you are on duty. Additionally, you cannot solicit employees that are on duty.

In other words, you cannot solicit anyone here at the hospital while you and/or they are working.

You should also remain in your work area unless it is necessary to leave the department on work related business.

This should be considered a final warning-any further violations of this nature could result in termination of employment.

<u>Joan Roberts</u>	<u>E.E. Lott</u>	<u>4-10-02</u>
Employee Signature	Management	Date

GL/cj
Copy to file

Record on Appeal 1622

He would give excuse for them that I was rude and then complain that I needed to try harder to keep out patients on time. My job required me to give directives to get the work done, but if I was perceived aggressive in the least bit, I had no interpersonal skills. He perceived aggressiveness in Darrell as having the necessary interpersonal skills to be the Lead CAT scan technician. If I made a negative observation, I was not a team player whereas a negative observation by Darrell was an opinion.

119. New hire TCMH employees are not eligible for promotion or transfer for 6 months. Keith Moffett was hired in August of 2001 and could not have been considered for the Lead tech position as Frances Standridge stated in her response.

120. November 30, 2001 , I received an adverse performance evaluation. I responded in writing with a request for Mr. George Burns, if he could show, me some complaints made and the specific instances he is judging me on, that it would be most helpful. I never received an answer or any specifics.

121. I was heavily scrutinized daily.

122. December 11 , 2001 , I suffered a mental breakdown and was unable to go to work.

123. April 8th, 2001 , I sought information in the form of full names, addresses and phone numbers from various employees at various times. It was an unusually slow day, with nothing much to do. I had been requested to provide such information for all possible witnesses by the hospital attorney, Louise

[APP 5 U]

Tausch. Some of the employees were at lunch, on break, walking down the hall, or at other times when I believed they were not engaged in work related activities. The needed information was requested of all possible witnesses.

124. April 9th, 2002, I scanned a CT of the abdomen and pelvis on a patient that had been admitted through the night from the ER, that had been in a car wreck. Keith Moffett arrived that morning and helped me take the patient over to X-ray for a chest x-ray and transport, to take the patient up to his room. There was wasn't anyone in sight, when Jay the Radiology R. N. came from a room. I did not want to leave the patient unattended because I believed the patient had a fractured spleen and it was not uncommon for a patient to wait 30 minutes or more to be taken up to their room. Therefore, I ask the nurse to take the patient's vital signs and stay with the patient because I believed he had a possible fractured spleen.

125. April 10, 2002, Gene Lott gave me two different written final warnings in the presence of George Burns, that were dated April 9th. There was no discussion before he gave me the letters. As he handed me the letters he stated that "After your finish reading these, I need you to sign them, signing them doesn't mean that you agree or disagree, I just need you to sign them as acknowledgment that you received them."

126. The letters were not written on the standard counsel form with individual boxes describing the type of warning was receiving with the instructions regarding the proper

[App 5 U]

S.W.2d 691, 694 (Tex.App.-El Paso 1991, no writ). Circumstantial evidence, and the reasonable inferences from such evidence, can prove the causal connection. *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d 654, 658 (Tex.App.-El Paso 1989, writ denied). Once the link is established, it is the employer's burden to rebut the alleged discrimination by showing there was a legitimate reason behind the discharge. *Hughes Tool Co. v. Richards*, 624 S.W.2d 598, 599 (Tex.Civ.App.-Houston [14th Dist.] 1981, writ ref'd n.r.e.), cert. denied, 456 U.S. 991, 102 S.Ct. 2272, 73 L.Ed.2d 1286 (1982).

Circumstantial evidence sufficient to establish a causal link between termination and filing a compensation claim includes: (1) knowledge of the compensation claim by those making the decision on termination; (2) expression of a negative attitude toward the employee's injured condition; (3) failure to adhere to established company policies; (4) discriminatory treatment in comparison to similarly situated employees; and (5) evidence that the Stated reason for the discharge was false. *Palmer v. Miller Brewing Co.*, 852 S.W.2d 57, 61 (Tex.App.-Fort Worth 1993, writ denied); *Montes*, 821 S.W.2d at 694-95; *Paragon Hotel Corp.*, 783 S.W.2d at 658.

903 S.W.2d at 77-78. Neither party has properly questioned these standards.³ Whether one uses the Hinds standard or the standard articulated by the court of appeals, however, there is some evidence to support the trial court's finding that Cazarez was fired in violation of section 451.001.

[12] Continental asserts that Cazarez was fired for violating the three-day rule. In *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 313 (Tex. 1994) (per curiam), we held that, "[u]niform enforcement of a reasonable absence-control provision, like the three-day rule in this case, does not constitute retaliatory discharge."

The three day rule, in *Carrozza* was essentially identical to the three-day rule, in the present case. An employer who terminates an employee for violating such a rule cannot be liable for retaliatory discharge as long as the rule is uniformly enforced. This conclusion follows from our holding in *Hinds*. If an employee's termination is required by the uniform enforcement, of a reasonable absentee policy, then it cannot be the case that termination would not have occurred when it did but for the employee's assertion of a compensation claim or other conduct protected by section 451.001. Thus, if Continental enforced the rule uniformly, and if Cazarez violated it, then Cazarez could not have been terminated in violation of the Anti-Retaliation Law.

3. In a post-submission brief, Continental and Duff argue only, and for the first time, that under *Hinds* Cazarez should bear the burden of proving that her filing of a workers' compensation claim was the sole cause of her termination. Not only is that argument waived, it is also incorrect. We explicitly held in *Hinds* that under the Whistleblower Act, "the report need not be the employer's sole motivation, but it must be such that without it the discriminatory conduct would not have occurred when it did." *Hinds*, 904 S.W.2d at 631.

[13] The three-day rule did not apply while Cazarez was on compensation leave. Cazarez was released to return to work October 28, and she told Duff she would probably return November 1 or 4. Cazarez did not report to work or call in on either day. On November 5 Cazarez's son told Duff's assistant that his mother was still sick, and by Duff's admission, this satisfied the three-day rule. Duff testified that Cazarez did not report to work or call in on November 6, 7, or 8, and that he fired her on the 8th. However, Cazarez testified quite positively that Duff called her on November 7 to tell her that she had been terminated. Crediting Cazarez's testimony, as we must, there is some evidence that she did not violate the three-day rule.

He would give excuse for them that I was rude and then complain that I needed to try harder to keep out patients on time.

My job required me to give directives to get the work done, but if I was perceived aggressive in the least bit, I had no interpersonal skills. He perceived aggressiveness in Darrell as having the necessary interpersonal skills to be the Lead CAT scan technician. If I made a negative observation, I was not a team player whereas a negative observation by Darrell was an opinion.

119. New hire TCMH employees are not eligible for promotion or transfer for 6 months. Keith Moffett was hired in August of 2001 and could not have been considered for the Lead tech position as Frances Standridge stated in her response.

120. November 30, 2001 , I received an adverse performance evaluation. I responded in writing with a request for Mr. George Burns, if he could show, me some complaints made and the specific instances he is judging me on, that it would be most helpful. I never received an answer or any specifics.

121. I was heavily scrutinized daily.

122. December 11 , 2001 , I suffered a mental breakdown and was unable to go to work.

123. April 8th, 2001 , I sought information in the form of full names, addresses and phone numbers from various employees at various times. It was an unusually slow day, with nothing much to do. I had been requested to provide such information for all possible witnesses by the hospital attorney, Louise

[APP 5 W]

Tausch. Some of the employees were at lunch, on break, walking down the hall, or at other times when I believed they were not engaged in work related activities. The needed information was requested of all possible witnesses.

124. April 9th, 2002, I scanned a CT of the abdomen and pelvis on a patient that had been admitted through the night from the ER, that had been in a car wreck. Keith Moffett arrived that morning and helped me take the patient over to X-ray for a chest x-ray and transport, to take the patient up to his room. There was wasn't anyone in sight, when Jay the Radiology R. N. came from a room. I did not want to leave the patient unattended because I believed the patient had a fractured spleen and it was not uncommon for a patient to wait 30 minutes or more to be taken up to their room. Therefore, I ask the nurse to take the patient's vital signs and stay with the patient because I believed he had a possible fractured spleen.

125. April 10, 2002, Gene Lott gave me two different written final warnings in the presence of George Burns, that were dated April 9th. There was no discussion before he gave me the letters. As he handed me the letters he stated that "After your finish reading these, I need you to sign them, signing them doesn't mean that you agree or disagree, I just need you to sign them as acknowledgment that you received them."

126. The letters were not written on the standard counsel form with individual boxes describing the type of warning was receiving with the instructions regarding the proper

131. June 7th, 2002, I was overcome by gas fumes shortly after arrival to work and underwent emergency treatment and was sent home by the ER Doctor after breathing treatments.

132. June 12th, 2002, I wrote Dorothy Brightwell, the Director of Quality management a letter of reporting the toxic gaseous odor that permeated the CAT scan, ultrasound hallway, which sent me to the emergency room with breathing difficulties. My reported concern was, that patients weren't evacuated from the area, that ionizing equipment was still in operation which could have caused an explosion depending what the gas was, and that the ER staff was not alerted as to what the victims were exposed to, in order to give proper treatment. Attached to this affidavit is a true and correct copy of my letter to Dorothy Brightwell.

133. I do not believe asking for information is the same as solicitation. The hospital solicitation policy is not enforced in any aspect to my knowledge. Solicitation is a common practice and has been since I was employed there. The entire hospital solicits on a continual basis. Management is aware that it is because employees solicit to them. I believe the only reason I was written up for seeking that information was because it made employees aware of what the law was, since very few people knew about the law. The law was not posted as required. It only became posted after I was fired, even though I made them aware in the Whistleblower suit on February 7, 2002 that it was not posted.

[APP 5 W]

disregard for the health, welfare or safety of a patient. Actual injury need not be established under this clause."

39. March 6th, 2002, plaintiff became mentally unable to continue work.

40. Plaintiff was mentally unable to go to work March 7th and sought medical treatment from Dr. Van Buskirk.

41. March 7th, Dr. Aydelott and Dr. Davis wrote a letter of libel to Mr. Burns, Mr. Jacobson, Mrs. Standridge, Mr. Lott and all board members requesting termination of plaintiff. Plaintiff became aware of this letter through discovery. The events of the letter were never discussed with plaintiff.

42. March 11th, when plaintiff arrived at work at 9:00 a.m. there was a meeting held with Mrs. Standridge, Mr. Burns, Mr. Beck and Mr. Moffett, excluding plaintiff. Plaintiff contends this meeting was held in a manner, with the obvious intent to intimidate plaintiff.

43. March 25th, 2002, Dr. Aydelott and Dr. attended the hospital board meeting to request plaintiff be terminated.

44. April 8th, 2001, plaintiff sought information in the form of full names, addresses and phone numbers from various employees at various times. Plaintiff had been requested to provide such information for all possible witnesses by the hospital attorney, Louise Tausch, in Discovery, for the Whistleblower lawsuit.

[APP 5X]

45. April 9th, 2002, plaintiff scanned a CT of the abdomen and pelvis on a patient that had been admitted through the night from the ER, that had been in a car wreck. Keith Moffett arrived that morning and helped plaintiff take the patient over to X-ray so transport could take the patient up to his room. There were no transports and plaintiff did not want to leave the patient unattended because she believed the patient had a fractured spleen and it was not uncommon for a patient to wait 30 minutes or more to be taken up to their room. Therefore, plaintiff requested the radiology nurse, Jay Young R.N., to take the patient's vital signs and stay with the patient because she believed he had a possible fractured spleen.

46. April 10, 2002, Gene Lott gave plaintiff two different written final warnings in the presence of George Burns, that were dated April 9th. There was no discussion before he gave plaintiff the letters. As he handed plaintiff the letters he stated that "After your finish reading these, I need you to sign them, signing them doesn't mean that you agree or disagree, I just need you to sign them as acknowledgment that you received them."

47. The letters were not written on the standard counsel form with individual boxes describing the type of warning plaintiff was receiving with the instructions regarding the proper documentation procedure and a place for employee responses.

48. Plaintiff stated she would sign them, but that she did not agree with them. Mr. Lott then said, "That's ok, you don't have to agree with it."

49. One letter stated:

a. We have been receiving complaints from employees in

[App's X]

you were on call. As a result we have had to contact Keith or Darrell to come in for the necessary procedures. Please understand each one of you is responsible for on-call duties and each of you have the requirement to fulfill those duties.

- d. The other issue involves you diagnosing patients' problems after they undergo procedures that you performed. Several patients have made complaints in reference to you giving them medical advice. It is not your job nor is it in your scope to diagnose or recommend patient treatment. This type of behavior needs to cease immediately.

51. June 4th, 2002, plaintiff expressed her concerns to the ER physician about a CAT scan of the head, he had her scan earlier, when he told her the CAT scan report was called to him as normal. Dr. Cole admitted the patient then and ordered a MRI the next morning with the result, the patient had a 2.5 cm. pituitary tumor.

52. June 6th, 2002, upon the ER physicians request, plaintiff showed him the CAT scan on a 20 yr. old spanish man that spoke no English. The language barrier made it hard for him to assess, but the physician told plaintiff, he was interested in the appendix and asked her what measurement she got on the appendix. She told him, 1 . 6 cm., of which he knew indicated a positive result. The scan was read as normal. The evening shift change between ER physicians left confusion, and the scan was repeated

[App 5 X]

with the Lead CT tech Mr. Beck. His measurement was normal for an appendix and the scan was reported as normal a 2nd time. The patient was discharged, but returned the next day with a ruptured appendix and peritonitis, which required a long hospital stay due to the misdiagnosis.

53. June 7th, 2002 plaintiff was overcome by gas fumes shortly after arrival to work and underwent emergency treatment and was sent home by the ER Doctor after breathing treatments.

54. June 12th, 2002, plaintiff wrote Dorothy Brightwell, the Director of Quality management a letter, reporting the toxic gaseous odor that permeated the CAT scan, ultrasound hallway, which sent plaintiff to the emergency room with breathing difficulties. Plaintiff's concern was, that patients weren't evacuated from the area, that ionizing equipment was still in operation which could have caused an explosion depending what the gas was, and that the ER staff was not alerted as to what the victims were exposed to, in order to give proper treatment.

55. June 14, 2002, plaintiff was called into George Burns' office at the end of her shift and handed a letter of termination from Gene Lott. The letter stated:

- a. On April 10th 2002, you received two different written final warnings. The subject areas covered in that counseling were solicitation of employees, on call responsibility and diagnosing patients' problems and giving them medical advice.
- b. Since that meeting on April 10, 2002, you have violated

[APP 5 X]

action for which redress is provided arises under the United States Civil Rights Act of 1964, ("Title VII") Article 42 U.S.C. § 2000e2 because the suit is a Civil Action for Unlawful Employment Practices. Federal Question jurisdiction is conferred on this Court by 28 U.S.C. 1331 and 28 U.S.C. 1343 (a) 3 because it is a Civil Action arising under the laws and Constitution of the United states.

C. Exhaustion of Administrative Procedure

5. Plaintiff timely filed with the Equal Employment Opportunity Commission (EEOC) a charge of discrimination against defendant. Plaintiff received a notice of the right to sue from the EEOC within 90 days of filing this complaint. A copy of the notice of the right to sue is attaches as Exhibit A.

D. FACTUAL BACKGROUND

6. Plaintiff is an employee within the meaning of Title VII and belongs to a class protected under the statue, namely female.

7. Defendant is an employer within the meaning of Title VII.

8. Plaintiff contends Mr. George Burns intentionally discriminated against plaintiff creating an abusive and hostile work environment based on sex in violation of Title VII.

9. George Burns conduct unreasonably interfered with plaintiff's work performance. Specifically, his conduct was severe and pervasive in treating plaintiff in a disparate discriminatory manner, compared to her two male co-workers.

10. Plaintiff's workplace was both objectively and subjectively hostile.

[APP 3 X]

11. Plaintiff contends the hostile work environment based on her gender was rooted in defendant, Mr. Burns', sex stereotyped set of beliefs and expectations as evidenced by his treatment of plaintiff.

12. As far back as the first week of September of 1992, Mr. Burns demonstrated his unwillingness accept plaintiff as being credible and make excuse for her two male co-workers when she complained to him that her two male co-workers, Mike Dalton and David Mogish, were spending the majority of their time on break outside the building and not doing their part in the CAT scan work schedule; leaving her to carry their share of the work with little or no assistance.

13. Mr. Burns held a meeting with the three techs after plaintiff completed her days work that night and told plaintiff that it was none of her business what her male co-workers were doing, that she was not their boss.

14. Plaintiff broke down upon arrival to work the following morning and received counsel from Jackie Martin, the TCMH social worker, who investigated and told plaintiff that Mr. Burns had full administrative support from Administration and they wanted to hear no problems out of her, so she advised her to seek outside counsel and take time off.

15. Plaintiff was off work for 2 months and received counsel.

16. Mr. Burns had full undisciplined control over plaintiff with administrations approval and he used this fact in a purposeful taunting manner to incite plaintiff, by her exclusion

[APP 5X]

in his communication of departmental matters to include her male co-workers, thus demonstrating his control over her.

17. Plaintiff contends Mr. Burns would not take what she said as being credible, even with explanation, when he expected and pressured her to film soft tissue and bone windows at the same time on bone related CAT scans, which was not possible; finally months later Mike Dalton informed Mr. Burns the machine would not allow plaintiff to film both at the same time.

18. Mr. Burns belittled and would not take plaintiff seriously when she requested training on a new heart nuclear medicine procedure no one had experience in performing and for which she was responsible for performing, in the spring of 1993. Plaintiff took her vacation time and set up training for herself in San Antonio at a heart center and bought books at her own expense.

19. Mr. Burns expected her to train another technician to perform CAT scans on call in two days and he wouldn't take her seriously when she tried to explain it was an impossible task.

20. Mr. Burns created a Technical Coordinator position for X-ray in November of 1997 and designated Mr. Adam Larson to this position without posting the position and allowing women of more experience or seniority to apply; Mr. Burns also created a Lead Ultrasound position the same way and designated Mr. Terri Rossie to that position.

21. Plaintiff filed a grievance against Mr. Adam Larson when he slandered plaintiff to male transportation aids in February

[App 5 X]

U.S. 658 (1978); Myers v. Hasara, 26 F. 3rd 821, 825, 628 (7th Cir. 2000)]

65. Mr. Lott and Mr. Burns were acting under color of the laws and regulations of the state of Texas and the Titus County Memorial Hospital when Mr. Burns through his biased understanding and selectively limited interpretation of the ARRT Code of Ethics number six, formulated a policy which was adopted by management and first promulgated to plaintiff on March 5th, 2002. This new departmental policy prohibited plaintiff from speaking out as a patient advocate, in the relaying of privileged pertinent information she attained through observation and communication; to the attending physicians with care, discretion and judgment. This was accomplished by Mr. Lott and Mr. Burns taking an adverse employment action against plaintiff with her termination on June 14, 2002. Plaintiff challenges the ARRT Code #6 and/or Mr. Burns' policy formulated by his interpretation of ARRT Code #6 as being written facially unconstitutionally vague as applied to plaintiff, or and/or on behalf of all x-ray technologists, when enforced as a rule, with a penalty of termination from employment. The policy fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited or guidelines for the enforcer to prevent arbitrary enforcement, therefore inhibiting not only speech but association. The exercise of these established policies and customs resulted in the violation of plaintiff's right of free speech and association. [42 U.S.C.~ § 1983; Lugar v. Edmonson

(App 5X)

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOAN ROBERTS

Petitioner

v.

TITUS COUNTY MEMORIAL HOSPITAL;
GEORGE BURNS, Director of Radiology Titus County
Memorial Hospital; GENE LOTT, Director of Human
Resources Titus County Memorial Hospital

PROOF OF SERVICE

I, JOAN ROBERTS, do swear or declare that on this date, September 27, 2005, I have served on each party to the above proceeding, Petitioner's corrected APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI, as required by Supreme Court Rule 29 by certified U. S. Mail, return receipt requested, properly addressed and prepaid to Jeffery C. Lewis, attorney in charge for Titus County Memorial Hospital; George Burns, Director of Radiology Titus County Memorial Hospital; Gene Lott, Director of Human Resources, Titus County Memorial Hospital and whose address is 1710 Moores Lane, P. O. Box 5517, Texarkana, Texas, 75505-5517, telephone (903) 792-8246.

Joan Carol Ellis Roberts, Pro Se

Joan Carol Ellis Roberts
65 C.R. 1044

Mt. Pleasant, Texas, 75455

(903) 572-9667

